

No. 13606

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Rela-
tion of and to the Use of Westinghouse Electric
Supply Company, WM. RADKOVICH COM-
PANY, INC., et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 261 to 535, inclusive)

Appeal from the United States District Court for the
Southern District of California, Central Division

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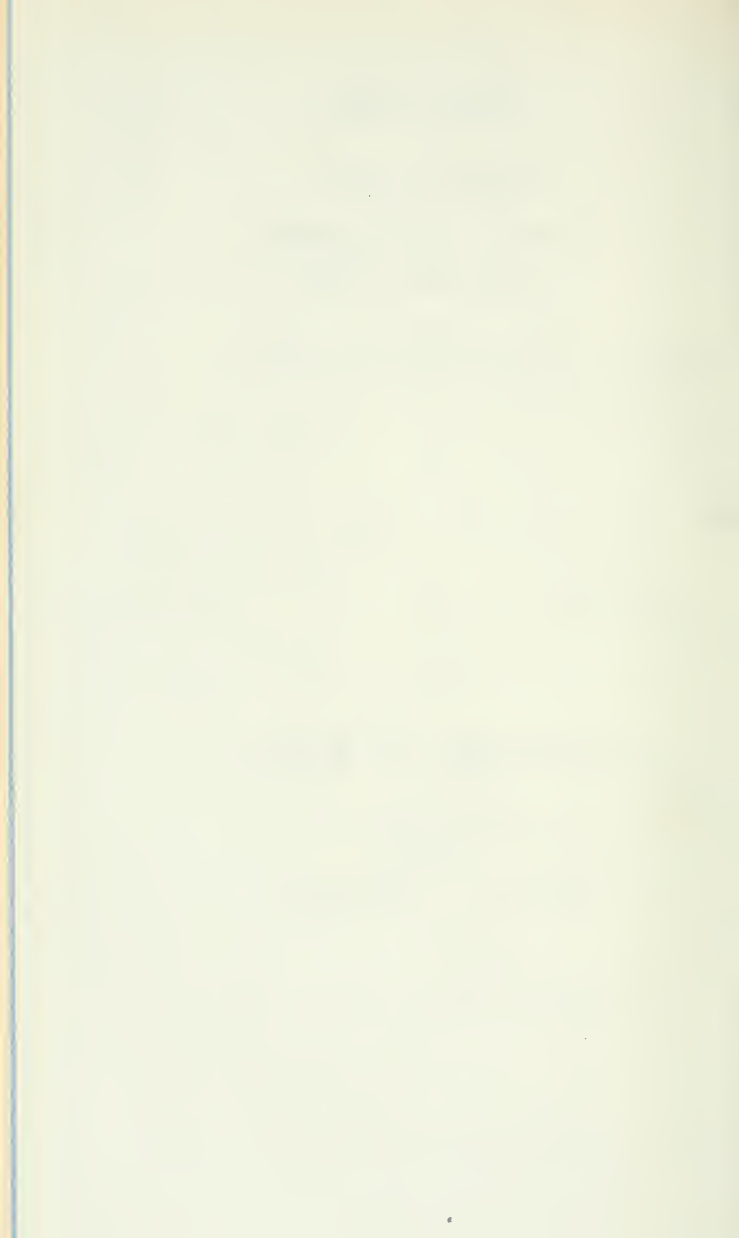
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(Testimony of Wm. Radkovich.)

Q. After you commenced work did Woolley go to work on his subcontract?

A. Yes. We set up a temporary shed up there for all subcontractors.

Q. Did you set up one for Woolley?

A. Yes, sir; a shed and tool place to keep his materials locked up.

Q. And he did go to work on his subcontract work, is that right?

A. He started prefabricating materials on the job.

Q. How were your payments made to Woolley?

A. Once a month, just the way we were getting paid from the Government.

Q. He was paid, then, on the basis of the work that he had accomplished up to that time?

A. Yes, sir. [41]

Q. On or about October, 1947 did Woolley come to you and request a payment of \$9,000?

A. He put in a payment—he sent in an estimate; it was around \$9,000; but the Government only allowed him \$5,000.

Q. Did Woolley come in to see you at that time about this payment? A. Yes; he did and——

Q. Did you have a conversation with him?

A. Yes, sir; I had it in my own office there.

Q. Who else was present?

A. No one but ourselves as far as I know.

Q. What was said by Mr. Woolley and yourself at the time of this conversation?

A. When I told him the Government would not

(Testimony of Wm. Radkovich.)

allow him except \$5,000, he told me they couldn't operate unless they had more money; he had to have \$9,000 that day. So I went out and borrowed \$4,000, on which he agreed to give me \$500 interest, then the next month or two or three months after, to put that \$4,000 against the contract.

Q. And on that day in October did you issue him two checks?

A. Yes; one for \$5,000 and one for \$4,000.

Q. What was the arrangement or conversation between you and Woolley, if any, as to the repayment to you of the \$4,000? [42]

A. Well, I told him I would take it out in the next estimate or the one after that, which would be the first month or the next month. The first month I let it go by. I wouldn't be sure on that, but I think either the first or second one he had a pretty good, substantial amount of money coming and I took that \$4,000 out of that payment.

Q. So on a subsequent payment he had coming you repaid yourself the \$4,000, is that correct?

A. That is right.

Q. Did Woolley continue throughout this job on the work or not?

A. Well, he was holding up our work all the time.

Q. Did he at any time ever leave the job?

A. Yes; he did.

Q. When was that, about?

A. I don't know the month. It must be in the files. We have letters in the files.

(Testimony of Wm. Radkovich.)

Q Was it after the first of the year, 1948?

A. It probably was.

Q. Did you have any conversation with him at the time he left the job?

A. Yes. I think we had a meeting with his attorneys up to Earl Shafer's, who was our attorneys at that time, just before that.

Q. Did Woolley state why he was leaving the job? [43]

A. I can't remember. The attorneys were in it. I wasn't much in the conversation, that part of it. He just walked——

Q. Was there a dispute at that time over the question of the fixtures? A. Yes, sir; it was.

Q. And did Woolley at that time refuse to install the fixtures or to furnish them?

A. He did.

Q. Did he leave the job? A. He did.

Q. For how long a period?

The Court: What fixtures are you talking about?

Mr. McPharlin: Electric fixtures.

The Court: All right.

Q. (By Mr. McPharlin): For how long a period was he off the job?

A. Approximately, I would say, a week or maybe shorter than that. I wouldn't know.

Q. And then he came back on?

A. Yes; after we hired another electrical contractor to come on the job which he started work, then he came back on the job again.

Q. I will show you Radkovich's Exhibit D, the

(Testimony of Wm. Radkovich.)

first back charge, pertaining to "2 light ceiling, porcelain". What [44] is that? "Ceiling lights" should that be?

A. Yes; "light ceiling,"—ceiling lights.

Q. Were those electrical fixtures?

A. Yes, sir.

Q. You notice here that there are a large number of these back charges which apparently are fixtures. Were all of these fixtures that you have included in your back charges paid for by yourself?

A. Yes; they were.

The Court: Is that Exhibit D?

Mr. McPharlin: Yes; that is Exhibit D.

Q. Was this after Mr. Woolley had refused to furnish these fixtures? A. Yes; it was.

Q. And you purchased the fixtures yourself?

A. That is right.

Q. You also show in your back charges payroll made for E. B. Woolley for the period from August 19th to September 8. Do you recall the occasion for your making the payrolls in August and September, 1948 for Woolley's men?

A. I do. He couldn't. He didn't have enough men on the job. He didn't have enough money. He didn't have no money to hire more men, so we had to hire them and put them on the payroll. I am sure that is what the occasion was. I mean I wouldn't swear to it. [45]

Q. You also have a back charge sheet in here—it is the last one of this group—where you show back charge to E. B. Woolley "15% overhead on

(Testimony of Wm. Radkovich.)

\$6,867.37 back charges." Will you tell the court what that back charge in the amount of \$1,030.11 consists of?

A. Well, that was for office and overhead.

Q. Do you mean that is——

The Court: How much was that?

Mr. McPharlin: That is \$1,030.11.

A. That was for the purchasing. We had to purchase the materials and have men on the payroll for it.

Q. Was that your overhead charge based upon these expenditures and payroll? A. Yes, sir.

Q. That you had to meet, which you claim was for Woolley? A. Yes, sir; it was.

Q. Mr. Radkovich, Mr. Woolley has claimed certain extras in this matter. Did you as the prime contractor receive any extras or additional compensation from the United States Government for any of the electrical work? A. No; I did not.

Mr. McPharlin: You may cross examine. [46]

Cross Examination

Q. (By Mr. Benedict): Mr. Radkovich, this general contract that you had involved the pouring of concrete houses where it was your function, as the general contractor, to erect the forms, is that not true? A. That is correct.

Q. And is it not true that Mr. Woolley, as the subcontractor, could not do any of the wiring work until the forms were up? Is that right?

(Testimony of Wm. Radkovich.)

A. Not in the house, but he could erect out in the field.

Q. He could cut wire and things of that sort?

A. Yes; all his wiring and everything in his shop.

Q. But as far as installing any of the wiring equipment in the forms, that could not be done until you had done your job?

A. That is right; but that only took an hour or two.

Q. Do you recall having given Woolley notice to proceed on this job?

A. Personally, myself, I would not know. The office probably did.

Q. I show you a letter dated August 8, 1947 on your letterhead and apparently signed by you, directed to Woolley and ask you if that is your signature?

A. That is not my signature. [47]

Q. It is not? A. No.

Q. Who signed it?

A. My man that worked for me, my office man.

Q. Who was that, Mr. Parks?

A. Mr. Parks.

Q. It was under your authority, however, was it not?

A. He was handling all the paper work.

Q. But he was authorized to send this out on your behalf, was he not?

A. That is right; that is right.

Mr. Benedict: I would like to introduce that into

(Testimony of Wm. Radkovich.)

evidence then, if the court please, as Woolley's first exhibit.

The Witness: May I correct that, please?

Mr. Benedict: Yes, surely. Pardon me.

The Clerk: That will be Woolley's Exhibit A into evidence, or, rather, Exhibit 1.

Q. (By Mr. Benedict): Do you know whether or not after that notice to proceed was sent to Woolley that he was given notice by either you or Parks to be ready on the job on September 1, 1947?

A. Mr. Parks handled all the arrangements on that.

Q. Do you know whether or not any such instructions were given him?

A. I wouldn't know. [48]

Q. You would not know. When did you have your first house ready to pour?

A. I don't know the dates.

Q. If I said it was about October 6, 1948, would that appear to you to be the correct date?

A. I wouldn't know.

Q. In event there was quite a delay between the time that you arrived on the job site yourself and the time you poured the first house, was there not?

A. There was with the army engineers, with ourselves and with the army engineers.

Q. During that period of time it is true, is it not, that Woolley was on the job with a crew of men?

A. With two men, I suppose—I don't know—erecting this—

(Testimony of Wm. Radkovich.)

The Court: That last exhibit may be received.

The Clerk: Yes, your Honor.

Q. (By Mr. Benedict): Do you recall having had a conversation with Woolley during the time that he was standing by with a crew of men before he was able to install any equipment in any of the forms, to the effect that unless he kept his crew up there, that he would be held liable for penalties by you? A. Absolutely not.

Q. Did you ever in any way state to him that he must [49] keep a crew of men standing by?

A. Myself, personally, no.

Q. Did anyone do it under your instructions?

A. Not that I know of.

Q. Now, Woolley completed his subcontract, did he not? A. Finally, yes.

The Court: Pardon me. What was the date that that first house was poured?

Mr. Benedict: I stated about October 6, 1948, your Honor.

The Court: Go ahead. Is that correct?

Mr. McPharlin: No. There has been no testimony on that point yet, your Honor.

Mr. Benedict: Well, it was simply in my question. We will have the Government engineer here in the morning and he will testify regarding it. I believe that I have stated it about right.

Q. When did you complete your contract, Mr. Radkovich? A. I don't remember the dates.

Q. Wasn't it sometime in October or November of 1948? A. That is somewhere near right.

(Testimony of Wm. Radkovich.)

Q. Do you know what your completion date was on your contract with the Government?

A. No; I do not.

Q. Wasn't it April 17, 1948?

A. It could have been. [50]

Mr. McPharlin: Mr. Benedict, I do not like to interrupt, but in the document entitled Radkovich's Exhibit B there is a change order by the Government pertaining to completion time.

Mr. Benedict: Is there? Well, I have not examined it.

Mr. McCall: Will you speak a little louder, Mr. Benedict? I can't hear over here very well.

Mr. Benedict: Well, it was just a matter to Mr. McPharlin, anyway.

The Court: There is a document, however, that shows the date of completion, is there not?

The Witness: Yes, sir.

Mr. Benedict: I believe that there is a document that shows the date of settlement under the contract. Wasn't that introduced by Mr. Behymer or did you introduce that?

The Court: You are talking about completion of the prime contract?

Mr. Benedict: Yes, your Honor. The Government engineer can testify as to that, anyway.

Q. Now, you state that Woolley was holding up the job. When did that first occur?

A. Mr. Parks would know exactly. I don't know. As far as all I know, we was getting calls in the office by the superintendents and calling Parks, and

(Testimony of Wm. Radkovich.)

he would tell me about it, and saying the job was being held up.

Q. So you do not know of your own knowledge, then, that [51] Woolley ever held up the job, do you?

A. Well, excepting—well, I don't think I would know.

Q. As a matter of fact the Government engineer notified you, did he not, that you were delaying the work?

A. On account of weather, yes.

The Court: We will take a ten-minute recess.

(Short recess.)

Q. (By Mr. Benedict): How many sets of forms did you have on the job site, Mr. Radkovich?

A. I believe there was either four or five.

Q. What was your plan schedule as to the number of houses that you were going to pour each day?

A. Well, we was planning two or three houses a day.

Q. Were you able to maintain that schedule?

A. No; for the simple reason, one reason, the weather was very much against us. We would work several days, many days we would work one or two hours and then we would have to send all the men home because either the cold wind or ice cold weather, zero weather, and we couldn't keep operating.

Q. There were some days when you poured no houses at all, isn't that true?

A. That is right.

(Testimony of Wm. Radkovich.)

Q. And on at least one occasion the roofs of two of the houses fell in, did they not, that you poured?

A. They were frozen, yes; that is right, because they [52] were frozen.

Q. Do you recall having had a conversation with Woolley about the time the job started or a short time afterwards, when he called your attention to the fact that he had been given a set of revised drawings which called for additional things not provided for in the original drawings that he had been furnished?

A. I don't recall that at all, sir.

Q. Don't you recall about that time his calling your attention to the fact that he had not been required under the original drawings to supply a bell system; that you told him that you would see that he was paid for that item as an extra?

A. That is right; that was right.

Q. So you did state to him that as to the bell system, that you would consider that as an extra?

A. That is right, because I started—the army engineer, himself, and I were on the job—I am quite sure it was on the job, and they would furnish the tubing, whatever it was for, or something, and the difference in the labor would not amount to much.

Q. Have you ever paid Woolley for that extra?

A. I couldn't tell you, sir.

Q. How about the telephone system; was anything said about that?

A. Well, I am confused on those two. I don't

(Testimony of Wm. Radkovich.)

know if [53] that is the telephone system that we was discussing or the bell system.

Q. Could it have been both of them?

A. It could have.

Q. How about the light in the closet; was anything said about that?

A. Well, there was a discussion about it, but the way I understand it, they deleted some other lights to put that light in the closet.

Q. Did you say anything to Woolley about your considering that an extra that you would see he was paid for?

A. Well, I wouldn't be too sure about that.

Q. You might have told him that?

A. I might have, because I remember at the time the superintendent of the job was telling me about it that they were deleting certain lights and putting this other light in there, and I thought it was evening it up as far as I know. Mr. Parks would know about that.

Q. Mr. Parks was employed by your company at that time, was he not? A. Yes, sir.

Q. What was his official designation?

A. Well, he was everything, practically, buying, organizing, and working under my instructions.

Q. Did your company authorize him to conduct all [54] negotiations with subcontractors?

A. Yes, sir.

Q. On behalf of your corporation?

A. Yes, sir; we did.

Q. You did not know anything about the va-

(Testimony of Wm. Radkovich.)

rious plans that were given Mr. Woolley in connection with his subcontract, did you?

A. No; I do not.

Q. Did Mr. Parks handle all of that?

A. Mr. Parks handled all of it.

Q. Mr. Barrington was also connected with you at that time, was he not?

A. Yes; he was the architect.

Q. Do you know who gave Woolley the plans that he was given, whether it was Barrington or Parks? A. I couldn't know, sir.

Mr. Benedict: That is all as far as Woolley is concerned, your Honor. I believe Mr. McCall wants to ask him some questions.

The Court: You may proceed to cross examine.

Mr. McCall: Mr. Clerk, could you tell me the exhibit number of the construction contract?

The Clerk: I had one subcontract which was C. I don't know whether that is the one you refer to.

Mr. McCall: Did counsel put in the original contract? [55]

Mr. McPharlin: That is Exhibit B, Mr. McCall.

Mr. McCall: Thank you. Is it the closing time, your Honor?

The Court: Oh, no. We will proceed until you gentlemen get tired. We will work until 4:30 or 5:00 if you wish.

Cross Examination

Q. (By Mr. McCall): Mr. Radkovich, I hand you Radkovich Ex. B and on "2a" it purports to

(Testimony of Wm. Radkovich.)

show "Schedule of Payment" Item No. 1.2.3.4." and ask you if that is the order in which the estimates were made up? A. That is right.

Q. And in your entire contract there were only four items which you had to estimate?

A. That is right.

Q. Will you state to the court which one of these four the electrical work came under?

A. Item 3.

Q. Now, what other work besides the electrical work came under Item 3?

A. All the plumbing, cooling system—no. The plumbing and the finish work, cabinet work.

Q. Go ahead. Is that all?

A. Well, the concrete house, the shells and the floors—no. The floors was in Item 2. That is the shell and the [56] electrical, plumbing, and the cabinets, finish cabinets.

Q. And that is all that came under Item 3?

A. Yes.

Q. And that is the plumbing—

A. And the painting.

Q. In other words, your part, the pouring of the house, that came under Item 3?

A. That is right.

Q. You poured the walls and then with a crane you set them into place, did you not?

A. That is right.

Q. And that was also true of the roof?

A. That is right; the roof was poured at the same time that the walls were poured.

(Testimony of Wm. Radkovich.)

Q. This house is called the "Le Tourneau" house?

A. That is right; the Le Tourneau method type house; yes.

Q. So Item 3 covered the house itself, the pouring of the house and setting it up, and the plumbing, the cabinets and the electrical?

A. And the painting.

Q. And the painting. A. That is right.

Q. Those five things?

A. That is right. [57]

Q. And that is all that Item 3 represents?

A. That is right.

Q. How did you arrive at the amount you would pay each subcontractor under Item 3?

A. Well, we would get together with the resident engineer on the job once a month and we would go over and see what percentage each contractor had done and add it into this Item 3.

Q. And before you sent out each estimate, then, you would accumulate the estimates from the subcontractors and take them up with the engineer?

A. That is right, except the first payment, except the first estimate.

Q. Do you have in your records the various percentages earned by the subcontractors under Item 3 in connection with all of the estimates?

A. No. All I was given was a slip of paper, just a piece of scratch pad paper from the resident engineer on the job, showing electrical was \$5,000 and they figured probably there was 10 houses poured and so much money for that; and that is the way

(Testimony of Wm. Radkovich.)

they brought in electrical, the same way plumbing, the same way painting, and the same way pouring the house.

Q. I hand you what purports to be photostatic copies of the various estimates approved for you, numbered from 1 to 11. I will ask you if you recognize these as the photostatic [58] copies of original estimates which you received from the Government?

A. Yes; that is the ones, I believe. I am sure they are.

Mr. McCall: I do not know if it would be better, your Honor, to offer these as one exhibit or 11 different exhibits.

The Court: Those are estimates of what?

Mr. McCall: Estimates of amounts paid to the general contractor, which include the amounts paid to this particular subcontractor.

The Court: How are they significant here?

Mr. McCall: They show the amount paid to the general contractor each month, which includes the amount earned by the subcontractor, and from these we have to learn how much was due the subcontractor. There is a dispute between the general contractor and the subcontractor as to what he was entitled to each month.

The Court: How would that result in this computation? In other words, you maintain that there was more allowed by the Government to the subcontractor than was paid, is that the situation?

Mr. McCall: We take the position, the surety, that in the beginning he made a premature payment

(Testimony of Wm. Radkovich.)

of \$4,000, as one thing not involved in here.

The Court: Yes. [59]

Mr. McCall: But from then on, he did not pay him as much as he had earned under his contract.

The Court: I see.

Mr. McCall: And further, that along about the fifth estimate they completely changed the method of payment from that provided for under the contract to some other form.

The Court: And these estimates would show the variance between the payments provided for in the contract, is that your theory?

Mr. McCall: Well, they tend to, your Honor. It appears that we have no document before us or evidence showing how much the subcontractor was entitled to, and by these estimates we hope, through this plaintiff and the Government engineer and the subcontractor, to show how much of this he was entitled to each month.

The Court: I see. All right. Insofar as this particular item is concerned, you might summarize each exhibit, if you wish.

Mr. McCall: And offer them as——

The Court: Offer them as one exhibit. They bear different dates, do they not?

Mr. McCall: Yes; they do, your Honor, different dates, mostly different months.

The Court: They can be received as one exhibit, except they can be marked 1-A, or whatever that number is, A, B, C, [60] etc.

Mr. McCall: This will be the first offered by the

(Testimony of Wm. Radkovich.)

defendant surety for the subcontractor.

The Court: How do you propose to mark these, Mr. Clerk?

The Clerk: Your Honor, did you wish me to start with a new series and number, or simply give them No. 2 and treat them in sequence as Woolley's exhibits? I think it would be better to start with "No. 2." Woolley has Exhibit No. 1 so far.

The Court: All right; this will be 2.

The Clerk: Do you want me to mark these as you go along?

Mr. McCall: These are offered by the surety.

The Clerk: Glens Falls?

Mr. McCall: Glens Falls.

The Clerk: Yes; that is right.

Mr. McCall: And is it more advisable to offer them as one exhibit or, since there are separate months to represent separate dates and separate payments, should they—

The Court: They may be offered as one exhibit, exhibit whatever exhibit it is, 2, and it will be 2-A, -B, and -C, etc., as we go along each month.

Q. (By Mr. McCall): The first partial payment, dated October, 1947, purports to show under Item 3 eight per cent of the work completed. I will ask you if that is correct, Mr. Radkovich? [61]

A. That is right.

The Clerk: Are you offering that?

Mr. McCall: Yes.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

(Testimony of Wm. Radkovich.)

The Clerk: That will be Glens Falls Indemnity Company Exhibit 2-A.

Q. (By Mr. McCall): The second partial payment, dated October, 1947, shows under Item 3 that 24 per cent of the work under Item 3 was completed; is that right, Mr. Radkovich?

A. As far as I know, it is.

Mr. McCall: I offer this next.

The Clerk: That will be Glens Falls Indemnity Company's Exhibit 2-B in evidence.

The Court: It will be received.

Q. (By Mr. McCall): The third partial payment purports to show—it is dated December, 1947—that under Item 3 35 per cent of the work under Item 3 was completed; is that right, Mr. Radkovich?

A. Yes; it is right, but that is not 35 per cent of the electrical work. You are not referring to that, are you? That is 35 per cent of the total contract.

Q. That is 35 per cent of all the work?

A. Of all the work.

Q. The five items you mentioned a few moments ago? [62]

A. That is right; 35 per cent of the total job, not the one item, Item 3.

Q. That represents 35 per cent of the total work under Item 3?

A. That is right.

Mr. McCall: I offer this next, your Honor.

The Court: Of total work under Item 3, is that right?

The Witness: Yes, your Honor.

(Testimony of Wm. Radkovich.)

Mr. McCall: Yes, your Honor.

The Court: That is the same in each exhibit, A, B, and C, is that correct?

Mr. McCall: It is not the same percentage but it is the same question.

The Court: I mean the same item?

Mr. McCall: The same business, yes, your Honor.

The Clerk: This is Glens Falls Indemnity Company Exhibit 2-C into evidence.

The Court: Received.

Q. (By Mr. McCall): And the fourth partial payment, dated January, 1948, shows 47 per cent of the entire contract work under Item 3 to have been completed? A. That is right.

Q. Is that right, Mr. Radkovich?

A. That is right. They are all right.

Mr. McCall: I offer that next. [63]

The Court: It will be received.

The Clerk: Glens Falls Exhibit 2-D into evidence.

Q. (By Mr. McCall): And the fifth partial payment, dated March, 1948, shows 61 per cent of the entire contract work under Item 3 to have been completed, is that right? A. That is right.

The Court: What was the date of that?

Mr. McCall: March, 1948.

The Court: Was there one for February?

Mr. McCall: Apparently not, your Honor. I will offer this.

The Clerk: Glens Falls Exhibit 2-E into evidence.

(Testimony of Wm. Radkovich.)

The Court: Received.

Q. (By Mr. McCall): The sixth partial payment, dated March, 1948, shows 76 per cent of all the work under Item 3 to have been completed; is that right, Mr. Radkovich? A. That is right.

The Court: The date?

Mr. McCall: The date is March, 1948, your Honor.

The Court: Is that another March? I have one March.

Mr. McCall: I believe that is right. There were two in March, both of the fifth and sixth partial payments.

The Court: All right.

The Clerk: This exhibit for Glens Falls is Exhibit 2-F into evidence. [64]

Q. (By Mr. McCall): The seventh partial payment, dated April, 1948, shows 87 per cent of all the work under Item 3 to have been completed; is that right, Mr. Radkovich? A. That is right.

Mr. McCall: I offer this next.

The Court: Received.

The Clerk: Glens Falls Exhibit 2-G into evidence.

Q. (By Mr. McCall): The eighth partial payment shows that 90 per cent of all the work covered under Item 3 to have been completed; is that right, Mr. Radkovich? A. That is right.

The Court: Is there a date?

Mr. McCall: The date is May, 1948, your Honor.

The Clerk: Admitted, your Honor?

(Testimony of Wm. Radkovich.)

The Court: It may be received.

The Clerk: Glens Falls Exhibit 2-H into evidence.

Q. (By Mr. McCall): The ninth partial payment, dated June, 1948, shows 94 per cent of all the work under Item 3 to have been completed; is that right, Mr. Radkovich? A. That is right.

Mr. McCall: I offer this next.

The Court: Received.

The Clerk: Glens Falls' Exhibit 2-I into evidence.

Q. (By Mr. McCall): The tenth partial payment, dated July, 1948, shows 99 per cent of all the work under Item 3 [65] to have been completed; is that right, Mr. Radkovich? A. That is right.

Mr. McCall: We offer this next.

The Court: Received.

The Clerk: Glens Falls' Exhibit 2-J into evidence.

Q. (By Mr. McCall): The eleventh partial payment, dated September, 1948, shows 100 per cent of all work under Item 3 to have been completed; is that right, Mr. Radkovich?

A. That is July when? What date is that?

Q. September.

A. September. That is right.

Mr. McCall: I offer this, if it please the Court, as the next exhibit.

The Court: Received.

The Clerk: Glens Falls' Exhibit 2-K into evidence.

(Testimony of Wm. Radkovich.)

Mr. McCall: May I see No. 2, please?

The Clerk: You mean 2-A?

Mr. McCall: It is 2-A. Thank you.

Q. Mr. Radkovich, I hand you the Glens Falls' Exhibit 2-A, estimate dated October, 1947, marked the first partial payment, which shows eight per cent of all the work under Item 3 to have been completed, and ask you if that is the only record you have of the various subcontract work under Item 3?

A. As far as I know, that is correct.

Q. You do not have, any place, a breakdown showing how [66] much the various subcontractors were entitled to out of this eight per cent?

A. You mean for each subcontractor?

Q. Yes.

A. As far as I know, no; no, nothing. Like I said before, they just gave us a slip of paper and that was given to me by the resident engineer, and told me there was probably \$5,000 for electrical, 10,000 for plumbing, 5,000 for painting, and then maybe 50,000 for the house, whatever it is. They bunched it up together, whatever the percentage is, that comes to this amount.

Q. You mentioned five items in the construction of the houses which are under Item 3. Which one of those did you retain as prime contractor?

A. Myself?

Q. Yes. A. Do you mean what—

Q. What part of the work under Item 3 did you retain?

A. The house, the pouring of the house.

(Testimony of Wm. Radkovich.)

Q. The pouring of the house. Did you sub all the balance of it? A. That is right.

Q. In other words, you subbed the painting, the electrical—— A. The plumbing. [67]

Q. ——the plumbing?

A. And the cabinet work.

Q. And the cabinet work?

A. That is right.

Q. And you retained the pouring and erecting of the house? A. That is right.

Q. And all of those come under Item 3?

A. That is right.

Q. In connection with this first payment there how did you determine, if you did, how much Mr. Woolley was entitled to as the electrical subcontractor?

A. Well, I went on the project the first time myself. I got together with Mr. Ferguson. He was resident engineer at the time. We knew the site. We went over the site and gave the breakdown of each subcontractor which he thought how much money he was entitled to, and myself.

Q. And you sent that in?

A. That is right.

Q. Did you keep a copy of that so you could show the court? A. No.

Q. What percentage you handed in for the various work?

A. No; I did not. No; I did not. Like I said before, all the resident engineer ever gave me was a slip of paper [68] just for my own record to show

(Testimony of Wm. Radkovich.)

what percentage each subcontractor should be entitled to.

Q. When did he give you that, when he handed you your check?

A. No; when we made up the voucher.

Q. That is the payment voucher?

A. That is right.

Q. Not the estimate voucher you have before you?

A. Well, this is the same thing, isn't it? Payment and estimate voucher is the same thing.

Q. Did they not hand you a check?

A. No; they did not. They handed me this estimate voucher and it was signed either by myself or the superintendent on the job okaying the amount.

Q. Then how did you know the amount, the actual payment?

A. The Government sent a check into our office or we picked it up, either one. We would take the voucher in—no; that was not it, either. We borrowed money on this contract from the bank and the bank got the checks. We never did receive no checks. The bank advanced us on our estimates each month.

Q. Mr. Radkovich, can you look at the estimate before you and state to the court how much out of that Mr. Woolley, as the electrical contractor, was entitled to? [69]

A. Not by looking at this, because there is nothing here showing how much he was going to get, except my remembering that he put an estimate in

(Testimony of Wm. Radkovich.)

for \$9,000 or over \$9,000 for the first month, and all the Government allowed him was five.

Q. On what do you base your statement that all the Government allowed him was \$5,000?

A. That is just what I remembered in my mind. I had this slip of paper from the U. S. Engineer.

Q. And was that in pencil or was it typed?

A. Just pencil, just on a piece of scratch paper, because the Government——

Q. Was it signed by anyone?

A. No. The only thing was signed, this one here was signed by Ferguson, the voucher, and that had nothing to do with electrical or anyone else except Item 3 showed them all, and there was no breakdown in here at all showing what the electrical contractor got or the plumber or anyone else. After the first month the subcontractors were feeling that they were not getting what they were entitled to and they went over my head to the resident engineer on the job with their estimate. So he would know approximately what they had coming the next month, that month, during the work in that month; and that is the way he arrived at the percentage for the subcontractors and the percentage for myself. But it would still [70] be lumped back into Item 3, which, on the voucher or on the estimate, would never show nothing for any subcontractor.

Q. Under your system, then, of payments there was no way in the world for Mr. Woolley to calculate how much he was entitled to each month, was there?

(Testimony of Wm. Radkovich.)

A. After the first month, like I say, he took his estimate to the army engineer up there, and if the army engineer thought it was near right, he would tell me just about what. He would put on a slip of paper what he would think was Woolley or the plumber or anybody else would be entitled to that month. This contract, it is not broken down like any other contract; it is broken down regular into four items and the third item includes all the sub-contractors and myself. It is very hard to find out or know what the subcontractor was really entitled to.

The Court: Did you keep a log book of your bad weather?

The Witness: The Government has it, your Honor. There were many days we couldn't work at all and many days we only worked an hour or two. Either the wind was blowing so bad and the cold weather was on so bad and icy weather, and we could not pour any frozen houses.

The Court: Go ahead.

Q. (By Mr. McCall): Mr. Radkovich, you say that the Government engineer—and that was Mr.—

A. Ferguson. [71]

Q. —Ferguson handed to you each month a slip of paper on which he showed the amount that each subcontractor was entitled to out of that particular estimate?

A. Out of particular Item 3, whatever it was.

Q. Yes. A. That is right.

Q. Item 3? A. That is right.

(Testimony of Wm. Radkovich.)

Q. You had that in connection with the other items on the contract?

A. You mean the plumber or what do you mean, on grading and footings? What do you mean? Is that what you are talking about?

Q. Everything not covered by 3.

A. No; because he gave us a breakdown on different items like items 1, 2 and 4. They were all separate items; so the first month he gave us 25 per cent on Item 1, which is grading.

Q. Then, I understand that under Item 3 there were five different parts of the work, one of which you retained and the other four you subbed out?

A. Yes; that is right.

Q. And each month Mr. Ferguson would give you a slip of paper? A. Plus the voucher.

Q. Together with the voucher?

A. That is right. [72]

Q. Is that the payment voucher?

A. Payment voucher?

Q. In other words, a check for the amount of money?

A. Not a check—a voucher, which is one of these here estimates, if that is what you want to call it. We just took this down to the army engineer's and that is what they would pay us on.

Q. And he would give you this slip of paper separately for each one of the four subcontractors?

A. That is right.

Q. Or would it be all of them on one slip of paper?

(Testimony of Wm. Radkovich.)

A. Well, all on one slip of paper. It just showed how he arrived at this Item 3 at 10 per cent or 8 per cent, to show how he arrived at that Item 3.

Q. And then that was the only record that you had showing how much out of each estimate was due the subcontractors? A. That is right.

Q. And did you show those to the subcontractors and particularly to Mr. Woolley?

A. No. We had them come in the office and they would send their own estimate each month, after the first estimate. The first estimate—that is not the first estimate they brought in the office—it could have been on. The estimates always come in the office, and they would take their breakdown to the engineer and he would work off of that to give them [73] their breakdown, to give them their estimate after the first month.

Q. But the first month, you say that the Government only allowed Mr. Woolley \$5,000, whereas he claimed more than \$9,000?

A. That is right; because we had a shed set up up there for his materials and, as I recall it, the shed was locked and the army engineer couldn't go in and examine the materials he had in the shop to give him any estimate on it. And he put out that month probably a lot more than \$5,000, for which he needed the money, he said.

Q. Then, do you mean by that, Mr. Radkovich, that Mr. Woolley had included in what he claimed material that was under lock and could not be viewed?

(Testimony of Wm. Radkovich.)

A. Well, that is what I believe that is what it was.

Q. You don't know that?

A. No; I don't. All I know is that the Government allowed them approximately \$5,000 or \$5,500, less the 10 per cent of whatever the amount was.

Q. Then when you say the Government allowed him that much, that is based on your recollection of the slip of paper? A. That is right.

Q. And that is all it is based on?

A. That is right.

Q. And that was handed to you by Mr. Ferguson? [74] A. That is right.

Q. And it was in pencil? A. Well, yes.

Q. And not typed? A. No.

Q. And what did you do with that?

A. I just had it for my own personal record and I threw it away.

Q. Did you throw it away? A. Yes.

Q. After you threw that away or destroyed that record, then you had no record whatever showing how much was due Mr. Woolley from the first estimate, did you?

A. Well, from the first estimate, no, except the statement they send in to our office, which practically corresponded all the time, within a thousand or two thousand dollars, with what Mr. Ferguson allowed them.

Q. You say "the statement they sent into our office." Who are "they"?

A. The Government. I mean these vouchers. I

(Testimony of Wm. Radkovich.)

am not talking about statement to Woolley and their statement they sent to us after the month's work was completed.

Q. Mr. Woolley's?

A. Mr. Woolley's or Mr. Gluck's, whoever it was.

Q. I believe you say that Mr. Woolley's statement contained [75] more than \$4,000 above what the Government allowed?

A. That is the statement he sent in, yes; \$4,000 above what the Government allowed, and that is when he told me that he couldn't operate unless he got \$4,000 more.

Q. That was the first estimate?

A. I am sure it was.

Q. Now, you say that you loaned him \$4,000 at the same time you paid \$5,000 from the first estimate?

A. Yes; in two checks, one for five and one for four.

Q. Did you take the promissory note for the \$4,000?

A. Well, I left that up to the office. I don't know what they done on it. That was advanced. I was going to take it out of the next payment when he had the next money due him, the next payment or the payment after that.

Q. In other words, you considered then at the time that you were only advancing him this \$4,000 for one month?

(Testimony of Wm. Radkovich.)

A. No; a loan, a loan for one month, a personal loan.

Q. But you do not know if your office took a promissory note from him or not?

A. I do not.

Q. Well, did you handle this transaction of \$4,000 personally?

A. No. I just told the office manager to give him a check for \$4,000 and I signed it, and what they done between themselves, why, I wouldn't know.

Q. Then did he give you \$500 for the loan of this \$4,000?

A. Yes. It was a few days, or I don't know how long afterwards, that he gave it to me.

Q. Well, did he pay you back \$4,000 or did you take it out of his estimate?

A. No; I took it out of the second or third estimate he had money due when he had some work completed.

Q. Did he tell you to take it out of that estimate?

A. He was very upset about it, because he thought I was going to take it out of the last estimate. He said that is the understanding he had, that I was going to take it out of the last estimate.

Q. And he objected to your taking it out?

A. No; he didn't object. He just said it would make it very hard for him.

Q. I hand you what purports to be a photostatic copy of a check for \$500 and ask you if that is the check that Mr. Woolley gave you for the loan of the \$4,000 in question? A. That is right; it was.

(Testimony of Wm. Radkovich.)

Q. And was that endorsed and cashed by you?

A. Yes, sir.

Mr. McCall: I offer this, if the court please, as the next exhibit for the defendant surety.

The Clerk: Admitted, your Honor? [77]

The Court: It may be admitted.

The Clerk: That will be Gens Falls Indemnity Company's Exhibit No. 3 into evidence.

The Court: I believe you said that was given as interest, was it?

The Witness: Yes, sir.

Q. (By Mr. McCall): Did you have any agreement with him at the time he paid you this \$500 as to how long it was paying for the loan of the \$4,000?

A. No; nothing whatsoever.

The Court: What is the date of that check?

The Clerk: November 25, 1947.

Q. (By Mr. McCall): And do you remember what date after that you took the \$4,000 out of his estimate?

A. No; I don't remember no dates. I presume it was in the second or third payment—the third estimate, the second or third estimate.

Q. I hand you what purports to be a list of the payments, showing your check number and the date of the payment, and ask you if you can look at that and tell the court which estimate you took the \$4,000 out of?

A. Well, I would say it would be either in December or in January. I presume it would be. I wouldn't know for sure.

(Testimony of Wm. Radkovich.)

Q. And the December payment shown on here is dated December 30, 1947, by check No. 1694 and the payment in the [78] sum of \$3,000?

A. That is right.

Q. How much was his estimate that month, if you can state? A. I could not.

Q. Do you have any records which would show that?

A. The office might have. I wouldn't know. I know it was one of those payments that we was very short ourselves, and I took it out because I had my own payroll to make.

Q. Now, there is nothing from which you can determine whether or not you took the \$4,000 out of the December 30, 1947 payment or the payment of January 28, 1948? A. Nothing.

Q. Then after the first payment, you say that Mr. Woolley, along with other contractors, took their estimates direct to the engineer, Mr. Ferguson? A. That is right.

Q. Then how did you learn how much they were turning in the estimate for?

A. Well, either myself or my superintendent on the job would be there with them when they would bring them up.

Q. In other words, you or your superintendent would go to Mr. Ferguson, the Government engineer. A. That is right.

Q. And turn in the estimate prepared by Mr. Woolley, [79] after the first estimate?

A. That is right.

(Testimony of Wm. Radkovich.)

Q. And did that continue all through the various estimates Mr. Woolley handed in later?

A. Well, as far as I know, yes, as far as I remember.

Q. And then did you or your superintendent approve the estimates handed in by Mr. Woolley as to amount?

A. The office did, whoever was in the office there when they sent a slip in, whoever brought the slip in or sent it in. I think one month Mr. Woolley flew up and picked up a slip of paper from Mr. Ferguson, himself, and brought it down, showing to what he was entitled that month.

Q. Could you look at the schedule of payments and tell the Court what month it was that Mr. Woolley flew up to the engineer?

A. No; I couldn't. I will say this much: I am sure there was months there when Mr. Woolley didn't even turn his estimates in until after the estimate was made up, if I recall right.

Q. What do you mean that Mr. Woolley would not turn in his estimate until after the estimate was made up?

A. Well, his own estimate to our office showing what he earned that month. There was one or two months, I am quite sure, as much as I can remember, that he didn't get his estimates in in time. [80]

Q. Then when he did not get his estimate in in time what effect did that have on his percentage of work or of his payments?

A. Well, he would take the breakdown to Mr.

(Testimony of Wm. Radkovich.)

Ferguson, but I mean we wouldn't get a letterhead from him showing his own statement. That was only one or two occasions, and maybe was just one that I remember something about. I just recall that.

Q. Did that prevent him from getting his money?

A. No. The Government went over the job and checked the percentages, and they just sent this voucher in on Item 3, and that is the way we arrived at the payment.

Q. And at no time in connection with any of the estimates were you able to state how much money was due Mr. Woolley out of any of the estimates?

A. No, excepting like I say, this one statement where he took the 4,000. I think he took the \$4,000, and then he had the \$7,800 or \$7,000, something like that, coming for that month, and instead of that we just gave him \$3,000 or \$4,000. It was one of the two months. I am quite sure it was.

Q. You deducted the money you say you loaned him that month?

A. That is right; because he earned that that month and I took it off that estimate then.

Q. I hand you what purports to be a letter on the [81] stationery of "Wm. Radkovich Company, Inc.," addressed to "E. B. Woolley September 18, 1947" and signed "E. H. Parks," and ask you if that is Mr. Parks' signature?

A. That is right.

(Testimony of Wm. Radkovich.)

Q. It purports to enclose Article 16, copy of Article 16 of your original contract pertaining to payment procedure?

A. What do you mean "payment procedure?"

Q. I will ask you if you recognize that letter as the one sent to Mr. Woolley telling him how he was to receive his payments?

A. I know nothing about this letter at all. This is Mr. Parks' handwriting. He wrote the letter. He was handling it.

Q. Who was Mr. Parks?

A. Mr. Parks is the man that worked for me, under myself.

Q. And he had authority to handle matters of this kind? A. That is right.

Mr. McCall: I would offer this, if the Court please, as this defendant's next exhibit.

The Clerk: Admitted, your Honor?

The Court: Admitted.

The Clerk: That will be Glens Falls Indemnity Company's Exhibit No. 4 into evidence.

Q. (By Mr. McCall): I hand you, Mr. Radkovich, the [82] Radkovich Exhibit B, the contract you had with the Government, and refer you to page 4, Article 16, and ask you if that is the payment procedure referred to in that letter?

A. No; I wouldn't know. This was Mr. Parks who handled this item here.

Q. Do you know of your own knowledge what your contract with Mr. Woolley called for with reference to his payments?

(Testimony of Wm. Radkovich.)

A. Well, he is supposed to get paid five days after we get paid from the Government, as far as I knew. That is the understanding I had, less 10 per cent.

Q. And how was the amount to be paid to him calculated, if you know?

A. By the work he completed that month.

Q. Was that on a percentage basis of so much money? A. Percentage basis.

Q. And that is what is referred to in Article 16 of Radkovich Exhibit B?

A. I have never read that, so I would not know.

Q. You have never read Article 16 of your contract with the Government?

A. No; I haven't. No; I haven't.

The Court: Do you want to continue this evening or are we going to adjourn?

Mr. McCall: Well, your Honor, I have quite a few more questions, so I presume we had better adjourn. [83]

The Court: I think we might adjourn until tomorrow morning at 10:00 o'clock. I have another matter on at 9:30 which may take a few minutes over, but I think we will begin at 10:00. We will adjourn this trial until 10:00 tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. of the following day—Thursday, May 18, 1950.) [84]

Los Angeles, California, Thursday,

May 18, 1950, 10:00 a.m.

(Case called by the clerk.)

The Court: You were on the stand, were you not, Mr. Radkovich?

Mr. Radkovich: Yes.

Mr. Benedict: If the Court please, we have Mr. Ferguson, the resident engineer, here, and he is anxious to get back to his work if we may put him on out of order.

The Court: Yes; you may.

Mr. Benedict: Thank you. Mr. Ferguson, will you take the stand, please? He is being called as a witness on behalf of Woolley.

RALPH E. FERGASON

called as a witness on behalf of defendant, cross-defendant, and cross-claimant Woolley, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Ralph E. Ferguson, F-e-r-g-a-s-o-n.

Direct Examination

Q. (By Mr. Benedict): Mr. Ferguson, what is your business or occupation?

The Court: Pardon me just a moment. I would appreciate it if you can direct your questions from over in this direction somewhere, where we can see the witness and hear him [87] better.

Mr. Benedict: Yes; I will be glad to do that.

(Testimony of Ralph E. Ferguson.)

Q. What is your business or occupation, Mr. Ferguson?

A. I am resident engineer for the army engineers.

Q. How long have you occupied that post?

A. Approximately 18 years.

Q. Calling your attention Job No. Muroc AAF7-210-2, at Muroc Army Air Field, were you connected in any way with that particular job?

A. Yes, sir. I was resident engineer on that job.

Q. Were you the resident engineer from the commencement of the work to the completion of the work? A. Yes, sir.

Q. Will you state whether or not you were on the job daily during the progress of the work?

A. I was on the job daily. I think there was a week that I was gone on the entire job.

Q. When did the work commence on this job?

A. On the 28th of July, I believe, in 1947.

Q. And when was the first house poured on the job site?

A. The first house was poured on October the 2nd, '47.

Q. Do you know the defendant and cross-claimant E. B. Woolley? A. Yes, sir.

Q. Did you see him on the job site prior to October 2, [88] 1947? A. Yes; I did.

Q. Do you know whether or not he had a crew of men on the job site prior to that date?

A. He did.

Q. When was the job finished, Mr. Ferguson?

(Testimony of Ralph E. Ferguson.)

A. Well, I can't tell you that. This job was taken away from the contractor and finished by the Government.

Q. When was it taken away from the contractor; do you know that?

A. December in 1948, I believe.

Q. And what was the reason for the Government taking the job away from the contractor?

A. It was not being finished satisfactorily.

Q. Do your records show the date the job was required to be completed under the contract with Radkovich?

A. Yes, sir.

Q. Can you give us that date, please?

A. The 19th of April—wait a minute, now. He had 270 days from the 19th of April, 1947, to finish the job.

Q. Were any extensions of time granted Radkovich by the Government?

A. I don't think so.

Q. Mr. Ferguson, did Mr. Woolley delay the progress of this job in any way? [89]

A. I don't think so.

Q. In reference to the weather that occurred during the progress of the work on this job, did the weather delay the work in any way?

A. Well, it did some.

Q. To what extent would you say that it delayed the work?

A. Well, we had high winds occasionally and it was cold, down probably to 6 above zero a few times, and we had some rain; and I would say in

(Testimony of Ralph E. Ferguson.)

the entire job—this is just a guess now—it did not delay them over 10 days, at most, on the entire job.

Q. That delay of 10 days that you have given, is that your best estimate of the total number of days that the job was delayed?

A. Well, I would say it is not over 10 days.

The Court: When you say “270 days” do you mean working days?

The Witness: Calendar days, sir.

The Court: Calendar days.

Q. (By Mr. Benedict): What was the reason for the completion of the job extending past the 270 days that you have mentioned?

A. Well, I would say that the contractor did not proceed in the right manner to get it done in that time. [90]

Q. Would it be your opinion that he could have completed the work within the 270 days had he proceeded properly?

A. I think, if it had been executed properly, it could have; yes.

Mr. Benedict: That is all.

The Court: Just a moment.

Mr. McPharlin: No, no.

The Court: No questions?

Mr. McPharlin: No questions.

Mr. McCall: Yes; I would like to ask some questions.

The Court: All right.

Mr. McPharlin: Is that the order, your Honor?

(Testimony of Ralph E. Fergason.)

I assume that Mr. McCall should next examine the witness on direct.

The Court: He has called him out of order. I think that would be better.

Direct Examination

Q. (By Mr. McCall): Mr. Fergason, do you remember Mr. Woolley bringing his estimates, from time to time, as the job progressed to get your approval? A. Yes.

Q. Now, do you remember whether or not he brought his first estimate?

A. No, sir; he did not.

Q. But from the first estimate on, he brought them to [91] you to get your approval as to amount?

A. I would not say from there on, but he did bring a lot of them to me. I don't remember which ones, necessarily.

Mr. McCall: I have asked counsel if he can produce the originals delivered to Mr. Radkovich or Radkovich Corporation, dated February the 12th and March the 10th, 1948. Is it possible to get the originals?

Mr. McPharlin: I believe I could locate them, Mr. McCall. There are voluminous files which I do not have here. I have only segregated those which Mr. Benedict and I had previously gone over. However, if counsel states those are the true copies, why, I am willing to accept them as such.

Mr. McCall: There is some writing on this and

(Testimony of Ralph E. Ferguson.)

it is in pencil, and I suggest you strike through that.

Mr. McPharlin: Yes.

Mr. McCall: And use it otherwise.

Mr. McPharlin: May we, your Honor, scratch through these pencil notations as having no bearing?

The Court: You may.

Q. (By Mr. McCall): Now I hand you what purports to be the estimate dated February 12, 1948, and ask you if you can state to the Court how much you allowed Mr. Woolley on that estimate you have in your hand?

A. On the material I allowed the full amount.

Q. And what was the full amount? [92]

A. The amount of the material was \$18,000. Your full amount is twenty-two here. I allowed the full amount on the material, but I don't know about the rest of it.

The Court: What was the amount, eighteen or twenty-two?

The Witness: Eighteen thousand on the material. The full amount is twenty-two.

The Court: Yes.

Q. (By Mr. McCall): Will you state the exact amount, full amount? A. The total?

Q. Yes.

A. The total amount is \$22,798.50.

Q. And you do not remember whether you allowed that amount or only the \$18,798.50?

A. That is right.

(Testimony of Ralph E. Fergason.)

Q. Then I hand you the estimate from E. B. Woolley dated March 10, 1948, and ask you if you recognize that as the one he gave you or a copy of it?

A. Yes; I remember this. This was \$21,999.58 for heaters and I allowed the full amount on those, and he has asked for \$24,999.58. I don't know whether I allowed that full amount or not, but I did allow the \$21,999.58. I remember that specifically.

The Court: March, 1948, is that it?

Mr. McCall: On March the 10th, 1948, your Honor. [93]

Q. I believe you state you do not remember whether or not you allowed the full \$24,798.58?

A. That is right.

Q. Do you know if Mr. Woolley made an airplane trip to see you regarding one of these estimates, Mr. Fergason?

A. That is right; he did. He did; yes.

Q. And could you state to the Court which of these estimates he made?

A. The one on the \$21,000 worth of electric heaters.

Q. Is that the one, \$21,999.58?

A. Let me see it. I think that is right. That is right; \$21,999.58 on the electric wall heaters, Thermador heaters.

Q. Where did he contact you at that time?

A. In my office.

Q. Where was your office?

(Testimony of Ralph E. Ferguson.)

A. Muroc, at the air base.

Q. And just the two of you present?

A. Oh, I don't remember.

Mr. McCall: That is all, thank you.

The Court: Any cross examination?

Mr. McPharlin: Yes, sir.

Cross Examination

Q. (By Mr. McPharlin): Mr. Ferguson, you have stated that work commenced [94] July 28, 1947, and the first house was poured October 2, 1947, is that correct?

A. The first house was poured on October 2, 1947. Let me check a little more about the starting date. When did I tell you, the 28th of July?

Q. Yes.

A. They actually started unloading equipment on July the 31st, but his notice to proceed on the job was dated the 22nd of July, 1947, and it was received on the 24th of July, 1947, and that is the time the contract counts from.

Q. Do you know when Woolley first came on the job? A. No, sir.

Q. Isn't it true that these 100 houses were all uniform, built to the same plan and design?

A. That is right, sir.

Q. Now, isn't it also true that the electrical wiring was placed in pipes in some type in these concrete houses? A. Conduit; yes, sir.

Q. Isn't it also true that that, in the usual course of construction, required prefabrication?

(Testimony of Ralph E. Ferguson.)

A. Well, yes; to some extent.

Q. All I am getting at, Mr. Ferguson, is that there is or there was on this particular job considerable preliminary work to be done before the first actual pouring of a house?

A. That is right.

Q. And that would apply to the electrical contractor himself, is that not true?

A. That is right.

Q. In other words, had the electrical contractor not showed up on that job until October 2, 1948, at the time that first house was poured, that would have caused considerable difficulty, would it not?

A. That is right.

Q. You have stated, Mr. Ferguson, that the Government eventually took over these jobs at the latter part of 1949. Wasn't that because the contractor was financially unable to continue with the work?

A. It was in the latter part of 1948, wasn't it?

Mr. Benedict: Just a minute, if the Court please. I object to that as incompetent, irrelevant and immaterial as far as cross-claims between these parties are concerned.

Mr. McPharlin: Well, that has been brought out on the direct examination. I have the right to inquire into that as to whether or not the contractor was in default in the actual construction work or what the facts were, your Honor.

The Court: There was a voluntary statement made by the witness that the Government took it over. You should be allowed to inquire into the reasons.

(Testimony of Ralph E. Ferguson.)

Q. (By Mr. McPharlin): Wasn't the contractor in financial difficulties or wasn't he broke at the time the Government [96] took it over, Mr. Ferguson? A. I believe that is right.

Q. And the surety companies had already been called into the picture, hadn't they?

A. That is right, sir.

The Court: I did not get the last.

Mr. McPharlin: And the surety companies had already been called into the picture.

Q. At that time when the Government took it over wasn't the chief trouble due to the concrete roofs on these houses leaking or not being satisfactory?

A. That is right, sir.

Q. And these were, as I understand—and I would like your opinion—weren't these experimental houses, this concrete type of construction they were using?

A. That is right; they were.

Q. And these concrete roofs which were installed by the contractor did not prove satisfactory?

A. That is right.

Q. And when the Government stepped into the picture, why, changes had to be made to correct those concrete roofs, I believe?

A. That is right, sir.

Q. You have stated that there was no extension of time to your knowledge. [97]

A. Well, there is. I would like to chage that. I have it right here.

(Testimony of Ralph E. Ferguson.)

Q. I have a copy here in our exhibit, too, which is an executed contract.

A. Modification No. 2 extends to June, 1948. Is that what you have?

Q. Yes; that is the same that I have, Mr. Ferguson. It is that modification order. In addition to the actual prevention of work by weather, isn't it also true that some of these concrete roofs were frozen by the below-freezing weather? I don't know if you use the term "frozen," but isn't it true that the zero weather in some cases ruined the concrete that had been poured?

A. No; I don't believe so.

Q. Weren't there, I believe, two occasions on which the concrete roofs collapsed?

A. No. The concrete roofs settled, and we rejected the house because the roof settled; and it might have been due to cold weather, but it did not freeze, because the contractors had heaters in there to keep them hot.

Q. On the pouring of concrete, that is directly affected by the weather, isn't it? I mean at a certain point concrete does not properly set up?

A. That is right.

Q. In reference to Woolley's estimates was it your duty, [98] as the resident engineer, to determine the amount of progress payments due from the prime contractor to any one of his subcontractors?

A. No, sir.

Q. And you did, I believe, on a number of occasions furnish Mr. Radkovich with notations or in-

(Testimony of Ralph E. Ferguson.)

formal notes as to what you felt a certain subcontractor—how much of his work had been completed, didn't you? A. That is right, sir.

Q. But did you keep any copies? A. No, sir.

Q. Of those informal notes? A. No, sir.

Q. In referenc to those two payment estimates that you have referred to do you know whether or not Mr. Radkovich had any back charges against Woolley at those times, or did you inquire into that? A. How do you mean?

Q. I mean you have made reference to two estimates, one of February and one of March. Did you inquire as to or do you know whether at the time those payments may have been due to Woolley that Radkovich had any back charges against Woolley, or did you go into that?

A. No; I didn't. I don't believe I did.

Q. There has been reference to an estimate of March. [99] At that time did you inquire as to whether or not Woolley had any unpaid bills on his subcontract, or did you go into that?

A. I don't think so; no.

Q. And you did not inquire into the filing of a claim against the prime contractor by Westinghouse, did you? A. No, sir.

Q. Then as I understand it, you did on those two occasions, to your recollection, give an estimate as to how much work had been completed, but you did not attempt to make any decision as to how much money, if any, was actually due Woolley?

A. Now, what is that?

(Testimony of Ralph E. Ferguson.)

Q. But you did not make any decision as to how much money, if any, was actually due Woolley under his subcontract?

A. Well, I couldn't, because that would be up to the contractor.

Q. You were familiar with or generally familiar with the prime contract plans and specifications, weren't you, Mr. Ferguson? A. That is right.

Mr. McPharlin: I would like to read into the record some of the provisions here with which we are concerned.

Mr. McCall: As I understand it, counsel already has introduced into evidence what he proposes now to read, and I object to the reading of only a part of it, as the document [100] itself is the best evidence and it contains all of the record.

Mr. McPharlin: I think, of course, I do not want to read all of our documents. I would like to make reference to provisions that I feel are directly pertinent and, of course, counsel for the other side may make reference to those provisions they wish to bring out and bring to the attention of the Court.

The Court: Do you expect to inquire of the witness with reference to these provisions?

Mr. McPharlin: Yes; I do, your Honor.

The Court: You may proceed.

Mr. McPharlin: In the subcontract, on the first page, it has this paragraph: (Radkovich and Surety Exhibit C)

“Whereas, the subcontractor has read and fully

(Testimony of Ralph E. Fergason.)

is familiar with the terms, provisions and conditions of said principal contract, and understands the respective rights, powers, benefits, duties and liabilities of the contractor and of all subcontractors and of the United States of America thereunder;”——

The Court: Of course, the witness would have no information on the provision of that kind.

Mr. McPharlin: Yes. Well, I will bring this to the witness’s attention. On page 3, paragraph 6, it states:

“It specifically is understood and agreed that the interpretation and construction of all of [101] the terms, provisions, and conditions contained in this sub-contract shall be subject to the interpretation and construction of the principal contract and all such interpretations and constructions of the principal contract shall be fully binding upon each of the parties hereto.”

Q. Now, in the principal contract, Mr. Fergason, with which you are familiar, in Article 2 of the general provisions it has:

“Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In any case of discrepancy in the figures, drawings or specifications,

(Testimony of Ralph E. Ferguson.)

the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided."

Now, it is true that detailed drawings were requested of the contractor, or working drawings, isn't that correct, Mr. Ferguson?

A. Were requested of the contractor?

Q. Yes.

A. Blueprints, yes; shop drawings, yes. The main drawings on the job were furnished by the Government, I believe.

The Court: Pardon me. Are you talking about the drawings that accompanied the specifications and the contract, or some other drawings subsequently made?

Mr. McPharlin: No; we are speaking of the main drawings that he has just referred to. I will show them.

The Court: The main drawings are the ones that were part of the contract, is that it?

Mr. McPharlin: Yes, sir, your Honor.

The Witness: They were part of the contract and furnished by the Government.

Q. (By Mr. McPharlin): Are these the drawings that you are referring to, Mr. Ferguson, could you tell us?

A. Yes; these are the contract drawings.

Q. The exhibit you have just referred to is

(Testimony of Ralph E. Ferguson.)

marked Radkovich's No. H. I will also hand you Radkovich's Exhibit No. B, the contract document itself containing the specifications. Now calling your attention to the specifications, Mr. Ferguson, I would like to direct your attention to what I have on my copy as page 15-1. A. All right.

Q. This is marked at the head "Section 15 Electrical Work; Interior." Is this the section that pertains to the electrical work? A. Yes, sir.

Q. Now, I would like to read to you the first paragraph of this Section 15. The first paragraph is marked 15-01. "Scope."

"The work covered by this section of the specifications consists of furnishing all labor, equipment, supplies, and materials, (except equipment designated to be furnished by the Government) including pilot lamps and performing all operations, including cutting, channeling, and chasing, necessary for the installation of complete interior wiring systems, duct systems, and electric service connections in strict accordance with this section of the specifications and the applicable drawings and subject to the terms and conditions of the contract."

On page 15-2, paragraph 15-03, subparagraph b, it states;

"Materials and Equipment Schedules. As soon as practicable and within thirty days after the date of award of contract and before any materials, fixtures, or equipment are purchased, the Contractor [104] shall submit to the Contracting Officer for approval a complete list, in triplicate, of materials fixtures, and equipment to be incorporated in

(Testimony of Ralph E. Fergason.)

the work. The list shall include catalog numbers, cuts, diagrams, drawings, and such other descriptive data as may be required by the Contracting Officer. No consideration will be given to particular lists submitted from time to time. Approval of materials will be based on manufacturers published ratings. Any materials, fixtures and equipment listed which are not in accordance with the specification requirements may be rejected.”

And it states under subparagraph “c. Options of the Government.

“If the Contractor fails to submit for approval within the specified time, a list of materials, fixtures, and equipment in accordance with the preceding paragraph, the Contracting Officer will select a complete line of materials, fixtures, and equipment. The selection made by the Contracting Officer shall be final and binding and the items shall be furnished by the Contractor without change in contract price or time of completion.” Now, paragraph 15-19 of this section. “Fixtures.

“Where type numbers are indicated on the drawings, the Contractor shall furnish and install all lighting fixtures in accordance with the applicable details.” [105]

You are familiar with these specifications I have read, aren't you, Mr. Fergason? A. Yes, sir.

Q. And you are also familiar with the drawings? A. Yes, sir.

Q. You have been a resident engineer for the Government for 18 years, is that correct?

A. That is right, sir.

(Testimony of Ralph E. Ferguson.)

Q. And you are an engineer yourself?

A. That is right, sir.

Q. Now, Mr. Ferguson, in your opinion are the fixtures, lighting fixtures, required of the prime contractor to be furnished in these houses under this contract and plans?

Mr. Benedict: Just a minute, if the Court please. Are you through?

Mr. McPharlin: Yes.

Mr. Benedict: I wish to object to the question on the ground it calls for the conclusion of the witness and endeavors to usurp the very thing that the Court is called to pass upon, first. And secondly, upon the ground that the dispute between the subcontractor and the general contractor is based upon the action of the contractor in having given the subcontractor a set of plans and telling him that those were the plans, and based upon his reliance upon those, he entered into this contract. [106]

The Court: Not having read any of these papers, what do you propose to show by this witness by your question?

Mr. McPharlin: This witness is an expert and he was the resident engineer. He is well qualified. This dispute, your Honor, is a dispute between the subcontractor and the prime contractor. The prime contractor entered into a subcontract with Woolley, which, quoting from the subcontract, states as follows:

“The contractor engages and the sub-contractor agrees that, under the general supervision of the

(Testimony of Ralph E. Ferguson.)

contractor, the sub-contractor, upon receipt from the contractor of written notice to proceed, will furnish all labor and materials, tools, machinery, equipment, facilities, supplies and services, and do all of the things more specifically set forth and described in Schedule 'A' hereto attached, all in accordance in all respects with those certain specifications attached hereto and designated Schedule 'B', such specifications by this reference thereto being incorporated herein and made a part hereof; any of such matters or things by the specifications specifically provided to be furnished by the contractor or by the United States of America need not be furnished by the sub-contractor hereunder. The sub-contractor agrees that he will commence work under this contract within 2 days from and after the [107] receipt by him of such written notice to proceed from the contractor, and further promises and agrees to prosecute all of his work hereunder diligently and to co-ordinate his work with the work of other persons so that the sub-contract work may be completed on or before the 15th day of April, 1948. It mutually is acknowledged that time is of the essence of this sub-contract. By virtue hereof the sub-contractor binds himself to the contractor and to the United States of America to comply fully with all of the undertakings and obligations of the contractor under the principal contract, excepting only such matters as shall not apply to the sub-contractor's work hereunder as set forth in said principal contract.

(Testimony of Ralph E. Ferguson.)

“The sub-contractor further promises and agrees to perform all of his work hereunder pursuant to, and to supply all of the materials provided for herein, to, and otherwise to be fully bound by and perform each and every of the terms, provisions and conditions as contained in the principal contract and as shall be applicable to the services to be performed and the materials to be supplied by the sub-contractor hereunder. In the event that for any reason any doubt should arise as to the applicability of any of the terms, provisions or conditions of the principal contract [108] with respect to said services or materials to be rendered and supplied by the sub-contractor hereunder, then the conclusion of the contractor with respect to said applicability or inapplicability shall be conclusive and final.

“The consideration for the work to be done hereunder inclusive of the services to be rendered and materials to be furnished shall be the sum of \$80,000.00. All of such work to be done, services to be rendered and materials to be furnished shall be in strict accordance with the specification, schedules and drawings applicable, all of which same hereby are made a part hereof, and none of the same may be altered, changed or modified in any manner or respect without the written consent of the contractor being first had and obtained. The aforementioned consideration shall be paid to the sub-contractor upon invoices and vouchers surrendered therefor, in such manner and form as shall be pre-

(Testimony of Ralph E. Ferguson.)

scribed by the contractor, subject to the reimbursement of the contractor therefor from the United States of America. Without, in any manner or fashion, affecting the generalities of the references to the principal contract and the agreements of the sub-contractor hereunder to be bound thereby, payments shall be made by the contractor to the sub-contractor only in accordance [109] with the reimbursement of the contractor under and pursuant to the terms, provisions and conditions of Article 16 of the principal contract; and the sub-contractor promises and agrees to cooperate with the contractor and to make, execute and deliver such instruments, vouchers and documents, inclusive of releases, as may be required by the contractor for compliance with the provisions of said Article 16." It goes on to paragraph 6.

"It specifically is understood and agreed that the interpretation and construction of all of the terms, provisions, and conditions contained in this sub-contract shall be subject to the interpretation and construction of the principal contract and all such interpretations and constructions of the principal contract shall be fully binding upon each of the parties hereto."

It has already been stipulated, your Honor, that this is the prime contract; that these are the plans and specifications which Mr. Ferguson has that the sub-contract was entered into on and which are a part of the sub-contract. And now the dispute is between the contractor and the sub-contractor as

(Testimony of Ralph E. Ferguson.)

to the interpretation of those plans and specifications. We have a question to a witness here who is the best qualified man, I assume, in the Court, and I would like to have his opinion, your Honor.

The Court: As to the interpretation?

Mr. McPharlin: Of the plans and specifications which are in dispute.

The Court: In what respect do you want an interpretation?

Mr. McPharlin: In this respect: You will notice that in Mr. Woolley's complaint or cross-claim he has alleged that the furnishing of electrical fixtures on this work was not an obligation of his under the sub-contract; so that is one of the issues in this case, whether under the plans and specifications for this electrical work the subcontractor, Mr. Woolley, is obligated to furnish the electrical fixtures.

The Court: Do your plans show electrical fixtures as part of the plans?

Mr. McPharlin: Yes. That is what I was going to go into with Mr. Ferguson here. I was going to ask him to explain, your Honor—

The Court: And do your specifications refer to electrical fixtures?

Mr. McPharlin: Yes. I have just finished reading those specifications where the reference to "fixtures" is made in numerous places.

The Court: Is it apparent on the face of the plans and within the descriptive matter in the speci-

(Testimony of Ralph E. Ferguson.)

fications that there is no ambiguity, or is there an ambiguity?

Mr. McPharlin: There is this one ambiguity, I believe, [111] on which Woolley is relying, as I understand it. In one place in the specifications it refers to code numbers for fixtures. Of course, what code numbers are, etc., is probably a matter for experts, and it is my understanding that there is not actually any code numbers on the plans themselves, but they have the symbols and general description and all of the other indications for electrical fixtures.

Now, I believe—I am subject to correction by opposing counsel, of course—that Woolley is basing his denial of furnishing electrical fixtures on the one point that on these plans there is no code number on any specific point to indicate the exact type of fixture.

Mr. Benedict: A little bit more than the code number, your Honor, I think. The specifications provide, which Mr. McPharlin just read, that where “type numbers” are indicated on the drawings the contractor shall furnish and install all lighting fixtures in accordance with the applicable details.

Now, I have not examined the Government plans, but the plan that Mr. Woolley was given by Mr. Radkovich contained no type numbers until after he had started on the job, and then he was given a set of plans that did call for the furnishing of electrical fixtures. That is the basis of our dispute as far as furnishing electrical fixtures is concerned.

(Testimony of Ralph E. Ferguson.)

I do not know whether the Government plans—I might ask Mr. Ferguson that one question—do the Government plans, [112] Mr. Ferguson, show type numbers for electrical fixtures?

The Witness: No; they do not.

Mr. Benedict: Well, then, that is the very point, your Honor, in the whole thing here. If the Government plans do not show type numbers, it just lends support to our contention. I did not know that until just now. I know the subcontract plans did not call for it, but now we find the Government plans do not call for it.

Mr. McPharlin: Yes; I believe counsel's statement of the issue is correct. I am sorry. It was not "code number." I see they say it is "type number." And that is the issue on the fixtures, your Honor.

The Court: If you let this witness examine the plans that you referred to as having been furnished by the prime contractor to Mr. Woolley, to determine if that appears on the Government plans, I think that would be a proper inquiry.

Mr. Benedict: I think so. I think that should be.

The Court: You might do that, and if there is any ambiguity in relation to the Government plans, as to the specifications and drawings, I think the witness could testify to that.

Mr. McPharlin: Mr. Benedict, do you have the plans that you have referred to?

Mr. Benedict: Yes; I have them.

Mr. McPharlin: I think those are identical, your Honor, to the plan in front of Mr. Ferguson; and

(Testimony of Ralph E. Ferguson.)

I think if we can [113] agree on that, it will save that much time.

The Court: Yes.

Q. (By Mr. McPharlin): Will you examine this plan—

Mr. Benedict: That has not been introduced.

Q. (By Mr. McPharlin): —which Mr. Benedict has just handed me?

The Court: You can mark it for identification if you wish.

Mr. Benedict: Well, it will save time. If it is agreeable to the Court, Woolley will offer it into evidence at this time, then.

The Court: All right.

Mr. McPharlin: I only wish to make one point, that there are some notations made on there by Mr. Woolley, which, of course, we will not be bound by, your Honor.

Mr. Benedict: That is so understood.

Q. (By Mr. McPharlin): Mr. Ferguson, could you tell me if that set of plans which Mr. Benedict has just produced as to electrical work is the same as the exhibit you have in front of you?

A. It looks the same to me.

Q. Neither one of those plans show any type numbers for the fixtures, do they?

A. They do not.

Mr. McPharlin: Will you answer, or will the reporter [114] read the previous question that we asked the witness at the time the objections were made?

(Testimony of Ralph E. Ferguson.)

The Court: I think you had better mark your plans for identification.

Mr. McPharlin: Oh, I am sorry.

The Clerk: That will be E. B. Woolley's Exhibit No. 5 for identification.

The Court: Or, if you wish, it may be received into evidence if there is no objection.

Mr. McPharlin: No objection.

Mr. Benedict: It is my purpose to offer it into evidence, if the Court please.

The Court: Very well, it may be received.

The Clerk: Woolley's Exhibit No. 5 into evidence.

(Question read by the reporter as follows:

“Q. Now, Mr. Ferguson, in your opinion are the fixtures, lighting fixtures, required of the prime contractor to be furnished in these houses under this contract and plans?”)

Mr. Benedict: That was the question I believe I objected to, was it not?

Mr. McPharlin: Yes.

Mr. Benedict: I do not know whether the Court ruled on that or not. I will still maintain my objection to that question, your Honor. [115]

The Court: We had diverted the situation. I asked counsel to make a statement as to what he proposed to show by this witness at that point, and then he proceeded to read some more, and then it developed these plans were produced and the inquiry directed as to comparison of the plans, and I think that is what I was inquiring about. Now,

(Testimony of Ralph E. Ferguson.)

if the plans, Exhibit 5, conform to the plans shown, the Government plans which are made a part of the contract, I think that is proper inquiry.

Mr. Benedict: I do, too, your Honor. I did not know whether Mr. McPharlin proposed to ask this question again, calling for the opinion of Mr. Ferguson, or not.

The Court: I do not know.

Mr. Benedict: I did not want the witness to answer before I understood if that was his intention.

Mr. McPharlin: I am asking for the answer of the witness on that question, your Honor.

Mr. Benedict: The same objection, your Honor.

The Court: The question is now what? Give me your question again.

Mr. McPharlin: Oh.

Q. Mr. Ferguson, in your opinion, under the electrical section of the prime contract and the plans pertaining to the electrical work which you have in front of you, which you have stated are the same as the plans produced by Mr. Benedict— [116] now, under those is the prime contractor required to furnish the electrical fixtures for these houses on this construction job?

Mr. Benedict: That is my same objection, your Honor, without reiterating it again.

The Court: Is that calling for an opinion or calling for an interpretation of plans and specifications?

Mr. McPharlin: Well, the opinion would neces-

(Testimony of Ralph E. Ferguson.)

sarily be an interpretation, your Honor. I do not know that we could divide the two.

The Court: Let us have that read again, that particular clause that you want explained. Do you understand the question?

The Witness: Yes, sir; I think so. Do you want me to answer it?

The Court: The question is whether or not the sub-contractor is required to furnish electrical fixtures, pursuant to the Government plans, is that it?

Mr. McPharlin: Yes, and specifications.

The Court: And specifications?

Mr. McPharlin: Yes.

Mr. Benedict: Just a minute. Then, if the question is based on the requirement of the subcontractor being required to do it, I have an additional objection, your Honor, because it is an interpretation, you might say, on top of an interpretation. [117] I think that the question, as I originally understood it, was whether or not the general contractor was required to furnish the fixtures.

Mr. McPharlin: I have made quite a lengthy reference to the subcontract, wherein the subcontractor has agreed to fulfill all of the obligations of the prime contractor as to the electrical work, and it refers specifically on the subcontract:

“The specifications applicable to the work to be done hereunder are as follows:

“Specifications for Temporary Family Quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air

(Testimony of Ralph E. Fergason.)

Field, Muroc, Calif. Section 15 Paragraphs 15-0-1 through 15-26.”

Now, is that the section and the paragraph that we have been referring to, Mr. Fergason, in your testimony?

A. That is right, sir.

Q. I am asking for your opinion as to the requirement of the prime contractor to furnish electrical fixtures under this section of the specifications, plus the applicable plans that go with the specifications. I am confining it to that.

I do not think counsel means to indicate that the subcontractor was not to do the work as called for in Section 15, which is the electrical work.

The Court: I do not see any reason why the witness cannot [118] testify, even though it is obvious on the plans, whether or not the plans and specifications provide for certain fixtures. He may tell what those are. That would not be a matter of opinion. That would be a matter of fact as disclosed by the plans and specifications.

Mr. McPharlin: Yes, sir.

The Court: Now, you may testify.

A. The specification shows that the contractor, to me, furnishes the fixtures, but the plan does not tell him what kind.

The Court: That is the prime contractor, is it?

The Witness: That is right, sir.

The Court: Well, do the specifications tell him what kind?

The Witness: No, sir.

(Testimony of Ralph E. Ferguson.)

The Court: I do not know whether that is the answer you want or not.

Mr. McPharlin: We want the answer, your Honor.

Q. Mr. Ferguson, we have a similar question in reference to chime circuits. Mr. Woolley, in his claim, has included as extras a claim for installation of chime circuits. "Chimes," does that mean the door chimes, Mr. Ferguson? A. Yes, sir.

Q. In reference to that I wish to call to your attention Section 15-20 of the specifications. This is also under the electrical work. It states: [119]

"Signaling system (For Quarters). The Contractor shall furnish and install a low-voltage signaling system consisting of push buttons and musical door chimes, as hereinafter described and where indicated on the drawings. The Contractor shall install dual-purpose, 2-toned, bar-type musical chimes. Tones shall be amplified by two short resonating tubes. Tone bars and operating mechanism for each set of chimes shall be completely concealed by an approved ornamental housing. The signal for the rear entrance shall be distinct from that of the front entrance. Push buttons shall be of the flush type with nickel-plated trims and $\frac{5}{8}$ -inch flat pearl centers. Chimes shall be operated by means of an approved 8 to 10-volt bell ringing transformer flush mounted in the service room and connected to the nearest lighting outlet. Signal-system wiring shall be not less than No. 16 gage and shall be installed in conduit only where passing through masonry. No

(Testimony of Ralph E. Fergason.)

splices shall be made except where they will be accessible upon completion of the building.”

Now, I will ask you the same question again in reference to the chimes. Under the specifications for the electrical work, referring specifically to the paragraph I have just read you, and under the electrical plans which you have in front of you, is the prime contractor required under the electrical [120] specifications and under the plans for the electrical work to furnish chimes in the construction of these buildings?

A. He is.

Q. In addition to the requirement in these specifications is there any reference to chimes on the plans? A. No.

Q. And the chime circuits?

A. No; there is no reference to it at all.

Q. Is there a reference to a chime circuit on the plans?

A. No; no chime circuit there—oh, yes. Let me see, now. Wait a minute. I don't see any chime circuit on the plan. Let me see. Oh, yes; here it is over here. Yes; it is on there.

Q. Mr. Fergason, these are the original general plans or the general plans for the contract, aren't they? A. That is right.

Q. Isn't it customary and isn't it also required under the prime contract that shop drawings or plans showing greater detail are furnished by the particular trades?

A. That is usually the case; yes.

(Testimony of Ralph E. Ferguson.)

The Court: When you say "shop drawings" you mean working drawings?

Mr. McPharlin: Yes.

The Witness: That is right, sir.

The Court: What? [121]

The Witness: That is right, sir.

The Court: That is, working drawings as the work progresses?

The Witness: It shows in detail a little more than the general plan does usually.

Mr. McPharlin: There is another item in the Woolley's claim in reference to phone circuit labor which we do not dispute, your Honor, an item of \$133.33.

The Court: What does the contract say with reference to furnishing the Government with any further plans or additional plans?

Mr. McPharlin: Yes; it has that requirement which I referred to before, your Honor, the requirement for drawings. Do you recall where that was, Mr. Ferguson? I had it here once.

The Court: There is a provision in the contract, is there, requiring further specifications?

Mr. McPharlin: Yes; requiring that further drawings be submitted. Do you recall where that is, Mr. Ferguson?

The Witness: Not right now.

The Court: Well, it is not necessary at this time.

Q. (By Mr. McPharlin): Mr. Ferguson, after the work was started or commenced up at Muroc

(Testimony of Ralph E. Ferguson.)

isn't it true that it was discovered that the original electric plans would require some adaptation to the design of the building, the way it was laid out upon the project, or are you familiar with that?

A. What is that, now? [122]

Q. After they went up on the project and work was commenced, I believe, the latter part of July, isn't it true that some minor changes or adjustments had to be made in the electrical drawings to conform to the design of the building?

A. Not that I recall.

Q. Did you have any part in any such conference or meeting up there where there had to be any changes in the electrical plans or the conduits or whatever is involved, due to the actual design of the building?

A. Well, I don't remember now of any.

Q. I will hand you a document titled "Radkovich's Exhibit I," which is a blueprint or an electrical plan, and ask if you are familiar with that?

A. Yes; I have seen a plan like that.

Q. Did you have any part, yourself, in the preparation of that? A. No, sir.

Q. Is that the electrical plan for these concrete houses that they were constructed under?

A. I believe it is. It looks like it.

Q. That shows the chime circuits in greater detail, doesn't it? A. Yes, sir.

Q. Do you notice any other differences on that from the other set of plans, the original set of plans you have in front [123] of you?

(Testimony of Ralph E. Ferguson.)

A. Yes; I do.

Q. And what are they?

A. At the main entrance there is some shelves at the back of this main entrance, and the original plan shows two lights, fluorescent fixtures, and this plan shows three lights there and they are pull chains; and it also shows your push buttons at the back door and the front door for your chimes.

Q. The original plans, I believe you mentioned, showed two lights, fluorescent, and the revised plan shows three lights, is that correct?

A. That is right.

Q. Those two fluorescent lights that are shown on the original plan, isn't it true that they were later eliminated, Mr. Ferguson, in the houses?

A. That is right; yes. This eliminates them right here.

Q. And when those two fluorescent fixtures were eliminated on this revised plan, there was added one pull-chain fixture, is that correct, or doesn't it show?

A. These two were eliminated and three pull-chain fixtures were put in.

Q. Then the fluorescent were eliminated altogether and they were replaced by three pull-chain fixtures, is that correct? [124]

A. That is right, that is right.

Q. Three pull-chain fixtures, is that the way it was eventually built?

A. That is right, sir.

Mr. McPharlin: We will offer next into evidence

(Testimony of Ralph E. Ferguson.)

a blueprint entitled "Record Drawing—As Constructed" and ask that this be admitted as Radkovich's next exhibit in order.

The Clerk: Into evidence. Admitted, your Honor?

The Court: It may be received.

The Clerk: This is Radkovich's Exhibit J into evidence.

Q. (By Mr. McPharlin): Mr. Ferguson, I will hand you Radkovich's Exhibit J, which is a blueprint entitled "Record Drawing—As Constructed." Is that the drawing of the electrical work on these units as they were constructed? A. It is.

The Court: As they were constructed?

The Witness: As it was built; yes, sir.

Q. (By Mr. McPharlin): In reference to light fixtures, is that the plan identical to the original plan, with the exception of those three fluorescent lights that we mentioned?

A. I believe it is. It seems to be.

Q. It also shows the chime circuits as reference was made to on the original plans?

A. Yes, sir.

Q. And it shows that the two fluorescent closet lights [125] were eliminated? A. Yes, sir.

Q. And that at that location it shows that three pull-chain lights were added? A. Yes, sir.

The Court: Is that claimed as an extra?

Mr. Benedict: The added closet light is claimed as an extra; yes. We claim an added closet light.

Mr. McPharlin: There has been no credit given

(Testimony of Ralph E. Ferguson.)

or shown for the elimination of the two fluorescent lights, your Honor, but there is a claim made for an added closet light.

Q. Briefly, what are those closet light fixtures that were installed? Can you describe them very briefly, what they are?

A. Well, they are just an ordinary light, you might say, on a drop cord, about as simple a light as you can get, with a pull-chain on it that turns it on and off.

Q. With a pull-chain?

A. That is right.

Q. That is the three lights that they put in?

A. It was, yes.

Q. And previous to that the plans called for two fluorescent lights and those were eliminated?

A. That is right, sir.

Q. There has been a further claim made by the subcontractor as an extra consisting of two additional small [126] units necessary to replace two unacceptable units. Do you have any knowledge of what that is about, Mr. Ferguson?

A. Of units of what?

Mr. McPharlin: I wonder if we might ask counsel for Woolley?

Mr. Benedict: That is when the roofs in these buildings fell in, the units for those, I believe.

Mr. McPharlin: What type of units?

Mr. Benedict: Kitchen units.

Mr. McPharlin: What type of kitchen units, the electrical wiring in the kitchen?

(Testimony of Ralph E. Fergason.)

Mr. Benedict: It was all the rough wiring in the building.

Mr. McPharlin: I see.

Q. I believe you made previous reference to two occasions where the roofs settled?

A. Yes, sir.

Q. There were two occasions?

A. Yes, sir.

Q. And you have previously stated that that may have been due to the near zero weather?

A. Yes. I would say it probably could have, yes.

The Court: This change in these lights was made in each house, is that correct?

The Witness: Yes, sir. Yes, sir; a hundred houses.

Mr. McPharlin: There are 100 identical houses, as I [127] understand it, your Honor.

The Court: Yes, sir.

Q. (By Mr. McPharlin): Mr. Fergason, to your knowledge, was the prime contractor ever paid any extra compensation for extras by reason of any electrical work?

A. I don't think so.

Mr. McPharlin: No further questions.

Redirect Examination

Q. (By Mr. Benedict): In reference to the two buildings where the roofs fell in, Mr. Ferguson, did Radkovich have any heat in the buildings?

A. Well, I would say he did. He was supposed to have.

(Testimony of Ralph E. Fergason.)

Q. You spoke of the original plans calling for fluorescent lights. Do you base that statement on your interpretation of the contract that the contractor was obligated to furnish fixtures, or do you base it on the fact that the plans themselves show fluorescent lights?

A. The plan so shows fluorescent lights.

The Court: I did not get that.

The Witness: The plans themselves show the fluorescent lights.

The Court: All right.

Q. (By Mr. Benedict): Do they show the type of fluorescent lights? [128]

A. No, sir. No, sir.

Q. In connection with——

The Court: Pardon me a moment. Did that change-over require any additional wiring, or was it merely a substitution of a drop light for fluorescent fixtures?

The Witness: It took a little extra wiring, sir.

Q. (By Mr. Benedict): In reference to Radkovich's I from which you have previously testified, I call your attention to the notation on the blueprint "Note: Electrical fixtures in accordance with list to be submitted for approval." Was that notation on the original set of plans?

A. No, sir.

Q. It is true, is it not, Mr. Fergason, that the type of electrical fixtures governed the price of the fixtures? A. I would say that is right.

Q. Electrical fixtures run from a merely nom-

(Testimony of Ralph E. Ferguson.)

inal price up to quite expensive items, do they not?

A. That is right, sir.

Q. And that depends on their type, is that not true? A. That is right, sir.

Q. Do you recall whether or not there was another plan that was also called "a revised electrical plan" that was submitted by Radkovich prior to Radkovich's I?

A. I couldn't tell you about that. I don't remember it.

Q. You don't remember. I show you a so-called "Revised [129] Electrical Plan" or, rather, a photostatic copy of one, and ask you if that refreshes your recollection as to whether or not there had been another working drawing submitted?

A. Well, these are not the same.

Q. That is true. Do you remember having seen this one before, the one I have just shown you?

A. No; I don't think that I do. No; I don't remember of seeing it.

Mr. Benedict: I would like to have the drawing I have just shown the witness marked for identification, if the Court please.

The Clerk: Woolley's Exhibit No. 6 for identification.

Q. (By Mr. Benedict): Mr. Ferguson, I show you copy of a letter dated February 18, 1948, directed to Radkovich Company and apparently bearing your signature or a copy of your signature.

A. Yes, sir.

Q. I ask you if the original of that letter was

(Testimony of Ralph E. Ferguson.)

written to Wm. Radkovich Company about the date it bears? A. It was.

Mr. Benedict: I would like to offer that into evidence, then, if the Court please, as Woolley's next exhibit in order.

The Clerk: Admitted, your Honor?

The Court: Admitted.

The Clerk: This will be Woolley's Exhibit No. 7 into [130] evidence, copy of a letter.

Q. (By Mr. Benedict): Mr. Ferguson, would you examine again the drawing of the work as completed, I believe it is entitled, and tell me if it is not true that that drawing does not indicate that those lights that you testified to heretofore are operated by pull-chain are actually on a switch?

A. They are on a switch and a pull-chain, too, I believe.

Q. They operate both ways, then?

A. I believe that is right. The switch is right here at the door, you see, that turns on.

Q. Isn't it a three-way switch that they are operated from? A. I believe it is.

Q. Then you would wish to change your testimony in that respect?

A. Well, but they have that pull-chain, too. There is the pull-chain right there, "PC," pull chain, you see.

Q. But there is also the three-way switch?

A. I believe that is right. I wouldn't swear to that, though.

Mr. Benedict: I believe that is all, your Honor.

(Testimony of Ralph E. Ferguson.)

Mr. McPharlin: I have just a few more questions if we have time, your Honor, if I may.

The Court: Very well. [131]

Recross Examination

Q. (By Mr. McPharlin): The type of electrical fixtures that were placed in the house, they were in accordance with a list furnished by Mr. Woolley, the subcontractor, weren't they, Mr. Ferguson?

Mr. Benedict: Just a minute now, if the Court please. That is, if the witness knows that they were furnished by Mr. Woolley. We did furnish a list, your Honor, and we did it under circumstances where we made our position clear that we were not obligated to furnish them or install them.

The Court: Do you know?

The Witness: I do not know, sir.

Mr. Benedict: I believe the letters that were introduced will show that. I do not have any objection to it, as far as that goes, if he knows.

The Court: He says he does not know.

Q. (By Mr. McPharlin): Electrical fixtures for this type of construction, are they pretty well standardized?

A. Well, in this case I would say no. I think this is the first buildings we had like this, and I wouldn't say it was standardized.

Q. In this type of building you would not have ceiling lights, would you?

A. We did not have; no.

Q. But wall brackets? [132]

(Testimony of Ralph E. Ferguson.)

A. That is right, sir.

Q. The Government did not require any gold-plated wall brackets or anything of the kind, did it?

Mr. Benedict: Just a minute, if the Court please. It is not what the Government required. Well, I withdraw the objection.

The Court: Counsel asked that question with a smile. I do not think he was very serious.

Mr. McPharlin: No.

Q. Do you know which is the most expensive type of fixture, a fluorescent or a common pull-chain fixture?

A. Well, I would say the fluorescent costs more money, but I would not guarantee it. You can get various prices on both kinds of them.

The Court: You are talking now about just the bulb or whatever you may call it?

The Witness: The fixture and bulb and all.

The Court: Yes.

Q. (By Mr. McPharlin): Fluorescent bulbs always require a fixture of some type, don't they?

A. To hold them, yes.

The Court: As a matter of general information, there is a tube that goes into a fixture?

A. Yes, sir.

The Court: And that has a frame, a framework of some [133] kind?

The Witness: Usually that is right; yes, sir.

The Court: And that costs more?

The Witness: That fixture serves that tube the

(Testimony of Ralph E. Ferguson.)

same as a regular bulb would into a socket.

Q. (By Mr. McPharlin): Mr. Ferguson, did Mr. Woolley while he was on this job coordinate his men with the progress of the other subcontractors and the prime contractor?

A. Yes; I would say he did.

Q. In other words, did he adjust his crew to the amount of work to be done?

A. I would say he did; yes.

Q. In this type of large construction is it true that at various times you will need quite a number of men and at other times, when it slows up, you won't need as many electricians? Isn't that true?

A. Well, yes, to some extent.

Q. He had varying crews of men; I mean varying numbers of electricians on the job?

A. Well, not too much. He had almost a steady crew all the way through the job, I would say.

Q. Did he have an excessive crew? Did he have too many men? A. I don't think so.

Q. In other words, the crew that he had was pretty well [134] adapted to the amount of work that they had to do?

A. I think so; yes.

Q. Therefore, he did not have a lot of his electricians standing around idle for an unusual length of time? A. I would say that is right.

Mr. McPharlin: No further questions.

Redirect Examination

Q. (By Mr. Benedict): Mr. Ferguson, in your

(Testimony of Ralph E. Fergason.)

opinion would Woolley have been able to have completed that job by April 15, 1948, in the electrical work with the men he had there?

A. He couldn't, because the buildings were not ready for him to put his work in.

Q. Assuming the buildings had been ready, do you think he could have done it?

A. With the number of men he had?

Q. Yes.

A. Well, I don't know. He might have. It might have taken another man or two.

Mr. Benedict: That is all.

Mr. McPharlin: Just a moment.

Recross Examination

Q. (By Mr. McPharlin): In respect of that, I believe you have already testified that his crew was adapted to the work that was going on? [135]

A. Yes; that is right.

Q. Therefore, if that progress of that work had been increased, say, two-fold, if the houses had been going up twice as fast, why, he would have, accordingly, had to have had a larger number of electricians, wouldn't he?

A. Why, sure; he would probably have had to have twice as many men.

Mr. McPharlin: Yes. That is all.

The Court: Anything further?

Mr. Benedict: That is all.

Mr. McCall: Could I ask just one question, your Honor?

(Testimony of Ralph E. Ferguson.)

The Court: Yes, proceed.

Further Direct Examination

Q. (By Mr. McCall): Mr. Ferguson, in the amounts that you calculated and gave to Mr. Radkovich and to Mr. Woolley as the amount due him under the various estimates, you did that as an accommodation to Mr. Radkovich and Mr. Woolley and the other subcontractors?

A. That is right, sir.

Q. It was not part of your job?

A. No, sir.

Q. And the amounts that you approved were after 10 per cent was deducted?

A. No. When I made an estimate I put down the figure, [136] and then I took out the 10 per cent later, you see, when it goes on the estimate.

Q. Then the estimates that I showed you this morning where you allowed certain amounts, was that after deducting the 10 per cent?

A. That was the amount the contractor paid for those fixtures that you show there, see. For instance, that \$21,000 and something, I allowed him that full amount, but when I put it on the estimate I have to take off 10 per cent, don't you see?

Mr. McCall: That is all.

Mr. McPharlin: No further questions.

The Court: Anything further?

Mr. Benedict: No, your Honor.

The Court: We will take our noon recess.

Mr. McCall: May this witness be excused?

The Court: Are you all through with him?

Mr. McPharlin: Yes, your Honor. I had one question. I believe I have one other letter, which I do not have available, from Mr. Ferguson pertaining to this work, that I have sent for and I will have this afternoon. But I think if you can see it, you can probably stipulate to it without the necessity of my calling Mr. Ferguson to attest to his signature.

Mr. Benedict: Oh, I think so, yes.

Mr. McPharlin: That is all. [137]

The Court: You may be excused. We will recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Thursday, May 18, 1950.) [138]

Los Angeles, California,

Thursday, May 18, 1950, 2:00 p.m.

Mr. McCall: I believe we finished with the engineer, and I believe that Mr. Radkovich was on the stand yesterday. May I ask if that is the right pronunciation; is it "Radovich" or it is "Radkovich"?

Mr. Radkovich: Either one, it doesn't make any difference. The "k" is supposed to be silent. That is the reason they say "Radovich" all the time.

Mr. McCall: Would you take the stand, then Mr. Radkovich?

WILLIAM RADKOVICH

Cross Examination—(Resumed)

Q. (By Mr. McCall): Mr. Radkovich, I show you what is in evidence as Radkovich Exhibit F, which is comprised of several letters or copies of letters which your counsel put in evidence yesterday, and point you to one letter here that is addressed to "Glens Falls Indemnity Co." and dated June the 10th, 1948, on the stationery of "Wm. Radkovich Company, Inc.," and ask you if your company sent that letter out?

A. As far as I know, yes.

Q. And then there is a letter addressed to "Mr. E. B. Woolley," the subcontractor, dated June the 10th, and down at the bottom of that letter it purports to have sent a copy to the Glens Falls Indemnity Company, his surety, and do you [139] know if that letter went out?

A. As far as I know, yes.

Q. I hand you herewith a copy of a letter I have just shown to your counsel, which purports to be a reply to the two letters of June the 10th, 1948, and ask you if your company received that letter?

A. I suppose they did. I don't know. Mr. Parks was handling that.

Mr. McCall: Shall we wait for Mr. Parks or shall we save a little time and stipulate that this letter was received by Radkovich Company?

Mr. McPharlin: If you say it was mailed. It is your letter, isn't it, Mr. McCall?

(Testimony of William Radkovich.)

Mr. McCall: It was mailed and I have a reply from it.

Mr. McPharlin: Well, then, let us stipulate that it was received.

Q. (By Mr. McCall): I show you what purports to be an acknowledgment—not a reply, but an acknowledgment—of that letter, and ask you if that was sent out by your office, Mr. Radkovich?

A. Yes; it has been, by Mr. Parks.

Q. In reply to the two letters of June the 10th, this letter of June the 11th was addressed to——

May I offer this, since it has been acknowledged, as defendant Glens Falls next exhibit in order?

The Court: It will be received.

The Clerk: That will be Glens Falls Indemnity Company's Exhibit No. 8 into evidence.

Mr. McCall: And then the one from Radkovich Company addressed to "John E. McCall" signed by Radkovich Company by "E. H. Parks" which has just been recognized by Mr. Radkovich, as the next exhibit in order.

The Clerk: Admitted, your Honor?

The Court: It may be admitted.

The Clerk: That will be Glens Falls Indemnity Company's Exhibit No. 9 into evidence.

Q. (By Mr. McCall): Now, Mr. Radkovich, I hand you Glens Falls Exhibit No. 8 and call your attention to the first paragraph which refers to those two letters in evidence of June the 10th, and that part of this letter of June the 11th to Radkovich Company in behalf of Glens Falls and signed by

(Testimony of William Radkovich.)

“John E. McCall” which says:

“Please give me the following information:

“1. The nature of default or defaults complained of and when the alleged default or defaults first came to your attention.

“2. Has the subcontract been increased or decreased by additions or deductions, and if so to what extent?”

And several more questions there, but to save time, did [141] you ever reply to any of those questions?

A. Myself, personally, no, but I suppose Mr. Parks did, though.

Q. You suppose he did? A. Yes.

Q. You do not know if he did?

A. No; I do not.

Q. Then I hand you Mr. Parks' letter which acknowledges receipt of that and states that:

“We will obtain the information and forward it to Mr. Shafer who will in turn forward it to you.”

Do you know if that information was even given to the Glens Falls or its attorney?

A. No; as far as myself, no.

Q. I believe you stated yesterday that you loaned Mr. Woolley \$4,000 at the time you paid him \$5,000 on the first estimate because he told you that he could not get along without it, is that right?

A. That is correct.

Q. And you believed his statement and that is why you made him the loan, is that right?

A. For the loan, yes, personal loan, yes.

(Testimony of William Radkovich.)

Q. Did you notify the Glens Falls Indemnity Company of this loan?

A. The personal loan? [142]

Q. Yes.

A. No; I did not.

Q. Referring you to that letter before you there, June the 10th, which states that Mr. Woolley was in default, was that letter sent out by you or at your suggestion?

A. It was sent out by Mr. Parks.

Q. At your suggestion?

A. I suppose it was.

Q. What default did you have in mind when you sent that letter out?

A. Mr. Parks handled that. I wouldn't know.

Q. You would not know what he was talking about? A. No.

Q. Do you personally know of any default whatsoever on the part of Mr. Woolley in the performance of his subcontract job?

A. On the job itself?

Q. Yes.

A. Not only that he was holding up the job at certain times, that is all, and he couldn't hire the men because he didn't have the money, and we was helping him take care of the pay rolls.

Q. Is that what you know of your own personal knowledge or from what someone else told you?

A. No. I was with Mr. Woolley, myself, several times. [143] Whenever he come for money he always come to me about the money proposition.

(Testimony of William Radkovich.)

Q. When did it first come to your attention that he was holding up the job?

A. Oh, Mr. Parks—well, I can't say when or anything else. I mean I don't remember when it was, but Mr. Parks, he was always in telephone conversation with him, and he told me many times that the job was being held up.

Q. That was what Mr. Parks told you. You do not know it of your own personal knowledge?

A. No; I don't.

Q. All right. But you say you were with Mr. Woolley many times?

A. In the office.

Q. In the office?

A. That is right.

Q. And what time, if any, did you learn from being with Mr. Woolley, or otherwise, that he was holding up the job?

A. Well, the times I went up. Probably I would go up to the job, maybe once a month, if I could arrange to go up there at that time, and he wouldn't have—he couldn't even get men, or at certain times he couldn't even get them through the unions. It was not his fault.

Q. What month was the first time that you noticed that?

A. I wouldn't know. [144]

Q. Well, let's see; do you remember when you started the job?

A. Approximately.

Q. And do you remember when Mr. Woolley went on this job?

A. Just about.

Q. What time was that?

A. Around July or August.

Q. All right. Then with that date in mind, could

(Testimony of William Radkovich.)

you state to the court when he first held up the job, of your own knowledge?

A. At first he didn't hold up the job.

Q. All right. How long was it before he did hold up the job?

A. Well, I would say 30 or 60 days—60 days later.

Q. Sixty days later. Would that be the latter part of September? A. It could be.

Q. Would that be before or after the first estimate was paid to him of \$5,000? A. After.

Q. How long afterwards?

A. I wouldn't know.

Q. What makes you know it was after you paid him the first estimate, Mr. Radkovich? [145]

A. Well, to be frank, I don't even know that, to be truthful. I don't know when it was. That situation Mr. Parks was handling, absolutely, every bit of that.

Q. As a matter of fact you don't know of your own knowledge that he ever held up the job in any way, do you?

A. Oh, several times I know. Three or four times I know, myself, because I was on the job myself when I saw he couldn't get the materials on the job in time or something else, delayed by men. I know several instances where he called unions and he couldn't get men, even, to work on the job.

Q. You cannot state, though, to the court, even what month you first noticed that?

A. No; I could not. No.

(Testimony of William Radkovich.)

Q. The \$4,000 which you loaned Mr. Woolley is included in the estimates which you have stated here that you paid him, is it not?

A. In total estimates?

Q. Yes. A. In total money we paid him?

Q. Yes. A. That is right.

Q. You heard Mr. Ferguson's testimony with reference to allowances that he made after the first estimate to various subcontractors?

A. That is right. [146]

Q. And you agree with him that he did that as an accommodation only?

A. Nothing else but accommodation.

Q. And it was not part of his work?

A. He was not even supposed to do it.

Q. But if he had not done it, there was no way in the world that you could have determined what each subcontractor under Item 3 was entitled to?

A. That was exactly right.

Q. So if he had not made those slips up for you showing the amount in dollars and cents which you owed the subcontractors, you would have had no way to calculate that, would you?

A. No; I wouldn't, because I didn't know anything about electrical work at that time. I mean so far as the rough work, what it amounted to, because it was never broken down.

Q. I believe you subbed four items out of the five which come under Item 3 of the contract, is that right? A. That is right.

Q. The fifth part, which was the pouring of con-

(Testimony of William Radkovich.)

crete and erecting the building, was retained by you? A. That is right.

Q. So after you paid the subcontractors the amounts coming to them as shown you by Mr. Ferguson, the engineer, then the balance of the money was yours?

A. If there was anything left; yes. [147]

Q. Out of each estimate? A. That is right.

Q. Are you familiar with the various plans which have been introduced here into evidence, personally? A. Personally, no.

Q. You do not know whether the plans were changed after the subcontract was signed or not?

A. No; I don't know anything about the plans, absolutely nothing, because I wasn't handling that part of it. I was handling the financial part and that was enough for myself.

Mr. McCall: Excuse me just a second until I speak to my associate. That is all, thank you.

Mr. McPharlin: Only a few other questions.

Recross Examination

Q. (By Mr. McPharlin): I believe you have previously stated that when a dispute arose about the fixtures, why, Woolley walked off the job, is that correct? A. As far as I know; yes.

Q. Was that a short time?

The Court: I am sorry. I didn't get your question.

(Question and answer read by the reporter.)

Q. (By Mr. McPharlin): Was that a short time

(Testimony of William Radkovich.)

before that letter to the Glens Falls of the early part of June?

A. I couldn't tell you anything about letters.

Q. Do you remember about when it was that Woolley walked off the job?

A. I don't know the dates or the month, even.

Mr. McPharlin: That is all. No further questions.

Mr. Benedict: I have no further questions.

The Court: Anything further?

Mr. McCall: No, thank you, your Honor.

The Court: That is all.

Mr. McPharlin: Mr. Radkovich and Sureties will call as their next witness Mr. E. H. Parks.

EUGENE H. PARKS

called as a witness by defendants and cross-claimants, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Eugene Parks.

The Clerk: Is the middle initial H?

The Witness: H.

Direct Examination

Q. (By Mr. McPharlin): What is your occupation, Mr. Parks?

A. I am associated at the present time with the General Contractors.

Q. In the contracting business?

A. That is correct.

(Testimony of Eugene H. Parks.)

Q. Were you previously employed by Wm. Radkovich Company? [149] A. That is correct.

Q. During what time were you employed by the Radkovich Company?

A. From June, 1947 until March of 1949.

Q. And you were with Radkovich Company during all of the time of this construction job which is in question here? A. During the entire period.

Q. Mr. Parks, I hand you a drawing which is captioned "Revised Electrical Plan," August 27, '47, which is on tissue paper, and ask you if you have ever seen this before?

A. Yes. This is the tracing of the electrical working drawings that Mr. Woolley and Mr. Higuera brought into my office from the job.

Mr. McPharlin: I will offer this into evidence as Radkovich's next exhibit in order.

The Court: It may be received. What was the date of that?

Mr. McPharlin: "8-27-47."

The Clerk: That will be Radkovich Company's Exhibit K into evidence.

Q. (By Mr. McPharlin): Now, Mr. Parks, you have stated that this was brought into your office by Mr. Woolley and Mr. Higuera?

A. That is correct.

Q. Was Mr. Higuera an employee of Mr. Woolley's, to your [150] knowledge?

A. To the best of my knowledge, he was an employee of Mr. Woolley's.

Q. And can you recall about when that was

(Testimony of Eugene H. Parks.)

brought into your office by Mr. Woolley and Mr. Higuera?

A. It was brought in by Mr. Woolley and Mr. Higuera around or on August the 27th or 28th of '47.

Q. Was there any conversation between you and Mr. Woolley and Higuera at the time that was brought into the office to you?

A. Prior to Mr. Woolley and Mr. Higuera coming into my office with this plan, I received a long-distance call from the job at Muroc in which I was notified at that time that a plan had been prepared and that Mr. Woolley and Mr. Higuera were going to bring it into my office and I was to anticipate this——

Mr. Benedict: Just a minute, if the court please. I object to this conversation the witness is narrating as not in response to the question and would be hearsay.

The Court: Sustained.

Q. (By Mr. McPharlin): Who was this conversation with, do you recall?

A. I don't recall.

Q. Was it with Mr. Woolley or Mr. Higuera?

A. I do not recall whether I discussed this with them before they came into the office. [151]

Q. After they brought it into the office did you have any conversation with Woolley and Higuera at the office?

A. Yes; I had conversation with Mr. Woolley and Mr. Higuera in regard to this plan. It was

(Testimony of Eugene H. Parks.)

noted when I went over this drawing with Mr. Higuera and Mr. Woolley, they pointed out to me the differences between this drawing and the contract drawing.

Q. What else was said?

A. They brought up the question of the fixtures at this time. They brought up the question of the telephone outlet at this time, and they brought up the question of the location of the signaling system, the push buttons, and the location or the addition of a pull-chain light in the closet in the living room.

Q. Then did you and Mr. Woolley and Mr. Higuera take this plan anywhere?

A. I called the U. S. Engineers and made an appointment to bring this plan down to their offices and submit this plan through their offices in order to get an approval by the U. S. Engineers of this working drawing.

Q. Did you then go to the U. S. Engineers' office with this drawing?

A. Then Higuera, Woolley and myself, in their automobile, went down to the U. S. Engineers' office.

Q. Did the three of you go in and see anyone in the [152] U. S. Engineers' office?

A. We went into Mr. McCumber's office.

Q. Who is Mr. McCumber?

A. Mr. McCumber's exact title I don't exactly recall, but it was Mr. McCumber's responsibility to take care of this type of matter in submitting drawings and channeling them through the U. S. Engineers to obtain approval.

(Testimony of Eugene H. Parks.)

Q. Was Woolley and Higuera present when you were in Mr. McCumber's office? A. Yes.

Q. Was there any conversation in reference to these drawings while all of you were present in this office?

A. Yes. We discussed the changes that were indicated on this drawing, changes that were necessitated by construction problems on the job, the addition or the showing the location of the push-button system, the telephone conduit, and the pull-chain and the fixtures.

Q. During this conversation at the U. S. Engineers' office did Woolley mention anything about fixtures on that? A. Yes; he did.

Q. If so, what?

A. He brought up the question of furnishing the fixtures at this project.

Q. How did he bring it up or what did he say, if you recall? [153]

A. His exact words I do not recall, but he brought it up in the manner that as far as he was concerned, he was not supposed to furnish or hang the fixtures.

Q. Did Mr. McCumber make any reply to Woolley and you at that time?

A. Yes. Mr. McCumber made the reply that Woolley, as a subcontractor for the general contractor, was not recognized in his office, and he was there as a matter of accommodation and convenience; and that that was a matter to be settled between the contractor and the subcontractor.

(Testimony of Eugene H. Parks.)

Q. Did McCumber make any statement as to any requirements of the prime contractor to furnish electrical fixtures, in the presence of Woolley at that time?

A. Mr. McCumber obtained a set of these specifications for the job at Muroc and read to us, particularly to me, that particular section of the electrical specifications which referred to the fixtures; and, as far as I could determine from Mr. McCumber's statements, it was the intent of the specifications and the intent and meaning of Mr. McCumber's statements to me that the prime contractor was being held responsible for the furnishing and installing of electrical fixtures.

Q. In reference to these drawings do you know, of your own knowledge, if any changes were made from the original plans in evidence due to the design of the house or the forms on the job? [154]

A. Yes. Perhaps Mr. Woolley's testimony, later, will back up my statements. It was my understanding that—may I see the original plan, the original electrical contract drawing and plan?

Q. I will hand you Radkovich's Exhibit H; is that what you want?

A. This is the drawing I am referring to. Radkovich's Exhibit H indicates on the electrical diagram that there are located in the living room electric heaters located under the windows, whereas Radkovich's Exhibit in evidence K indicates that those electrical heaters were changed from that location under the windows to the location to the right

(Testimony of Eugene H. Parks.)

or left-hand side of the windows, respectively. And I was told that the reason that change was necessary was due to the fact that the size of the heaters and the size of the windows would not permit the electrical heater to be installed under the window as it is shown on Exhibit H, which was the original contract drawing. Therefore, this Exhibit K is different from the original contract drawing in that respect.

Do you wish other changes detailed?

Q. No. You might state just generally whether those working drawings were required?

A. I made a request of Mr. Woolley's office when the subcontract was signed and at the time Mr. Woolley was given a written notice to proceed it detailed in there the general [155] instructions that he was supposed to follow in getting his work started on the job. One of the conditions or one of the responsibilities that I had with the Radkovich organization was to see that all of the things required of the prime contractor under his contract in reference to obtaining engineering information, the submission of shop drawings from the subcontractor, and the submission of a list of materials for approval. In regard to that I contacted Mr. Woolley or Mr. Woolley's organization in regard to submitting shop drawings.

This drawing that I am referring to here, this revised electrical plan, is what was submitted to me to obtain approval on from the U. S. Engineers, was that shop plan or working drawing.

(Testimony of Eugene H. Parks.)

Q. Mr. Parks, I will hand you a copy of a letter dated July 26, 1948, addressed to "Wm. Radkovich Company, Inc.," from R. E. Ferguson, resident engineer, and ask you if you have ever seen that letter before?

A. Yes; I recall of seeing this letter.

Q. Do you recall receiving that at the office of Radkovich Company? A. That is correct.

Mr. McPharlin: I will offer this into evidence as Radkovich's next exhibit in order.

Mr. Benedict: If the Court please, I did not realize this morning when Mr. McPharlin mentioned that he had a letter from Mr. Ferguson the nature of the letter. Apparently it [156] is an impeaching letter of Mr. Ferguson's. I think that under the circumstances it should have been shown to Mr. Ferguson. And I object to it on the ground that it is incompetent, irrelevant and immaterial, and no foundation laid for it.

I have to take that position because I do not want to take counsel by surprise, and I did not realize that that was the purpose of the letter, which is the only purpose I can see that it would serve.

The Court: Mr. Ferguson was your witness?

Mr. Benedict: He was my witness, your Honor. He was my witness. And it was written by Mr. Ferguson. It contains certain statements that would be in contradiction of what he said on the stand. Now he has been excused and we have no way of asking him about the inconsistency set forth in the letter.

Mr. McPharlin: I would not say that it is an

(Testimony of Eugene H. Parks.)

impeachment of Mr. Ferguson's testimony. It is a further clarification of his testimony, I believe. I am sorry, I did not have the letter myself, Mr. Benedict. At the time of our deposition I had been notified over the phone of this letter and I had requested it, and I had my girl go pick it up at the office and I did not get it until this noon.

Mr. Benedict: This is the first I have seen of it. We have gotten along very well in all our exhibits, and I do not want to be taking a super-technical view of it; but it does [157] contain certain statements that are a surprise to me and I feel that I have to do that.

The Court: Do you want to call Mr. Ferguson back?

Mr. Benedict: I feel that he should be called back, because it certainly contains some statements in there that are inconsistent with what he said.

The Court: I have not seen the letter and I do not know what it is.

Mr. McCall: I suggest that the letter be shown to the Court.

Mr. Benedict: Yes. I have no objection to the Court seeing the letter.

Mr. McPharlin: Yes. I do not think it is of that much importance.

Mr. Benedict: I have asked the Court to rule on it, so I would like to have your Honor read the letter.

The Court: Suppose you tell me what is in the letter.

(Testimony of Eugene H. Parks.)

Mr. Benedict: In brief, the letter purports to state that Woolley is one of the subcontractors that is behind in his work, which was absolutely inconsistent with what Mr. Ferguson stated on the stand this morning, that Mr. Woolley did not hold up the job. And, as I say, that is the first I had heard of any such statement as that from Mr. Ferguson.

The Court: Well, I do not know why Mr. Ferguson cannot be impeached by opposing counsel.

Mr. Benedict: He can be, your Honor, but he should be impeached by having the letter shown to him. That is the proper way to do it. I will admit that there is no question about it.

Mr. McPharlin: Well, I don't know that it is of that much importance.

The Court: No doubt Mr. Ferguson will acknowledge the letter if he wrote it.

Mr. Benedict: I would take Mr. McPharlin's statement for it, if he can testify that it comes from Mr. Ferguson, I am willing to rely on his word insofar as that part is concerned. I am not raising that.

Mr. McPharlin: In other words, as I understand it, you would call Mr. Ferguson here to make an explanation, rather than to have him, as you feel, impeached without being able to explain.

The Court: Just a little louder, please.

Mr. Benedict: That is right. That is right. If I had known the nature of it this morning when you mentioned it to me, but I did not know it contained anything of that nature.

Mr. McPharlin: Mr. Ferguson, as I understand,

(Testimony of Eugene H. Parks.)

has gone back to La Verne, California.

The Court: To where?

Mr. McPharlin: To La Verne. And I don't know that it is of that importance. If you want to insist upon your [159] objection, Mr. Benedict, why, I will withdraw the exhibit.

Mr. Benedict: I feel that I need to, your Honor, because, as I say, it takes me by surprise here.

Mr. McPharlin: I am sorry, too, that I did not have it, because I did not want to take Mr. Benedict by surprise.

Mr. Benedict: Mr. Ferguson may well have an explanation for it, but I do not know what it is.

On further consideration of the matter, your Honor, in view of the fact that that letter was written after April 15th, when Woolley was supposed to have completed his contract, and in order to keep away from a lot of these side issues, I will withdraw my objection and let the letter come in.

The Clerk: That will be Radkovich's Exhibit L into evidence.

Mr. McPharlin: Mr. Parks, did you have anything to do with the payments made to Mr. Woolley, the subcontractor? A. No; I didn't.

Q. What were your general duties as an employee of the Radkovich Company, Mr. Parks?

A. I handled the bulk of the correspondence between the prime contractor and the Government agency, and between the prime contract and the subcontractors. I handled the co-ordination of the delivery of materials and the purchasing of materials

(Testimony of Eugene H. Parks.)

for this particular project and other projects; and, in general, assisted Mr. Radkovich in what other duties he saw [160] fit for me to perform.

Q. You have testified as to a drawing on tissue paper that was brought in to you by Mr. Woolley and Mr. Higuera. I will hand you now a blueprint which is marked Radkovich's Exhibit I and ask you if that is the same as the tissue paper drawing?

A. The blueprint is the same except for one item.

Q. What item is that?

A. On the tissue paper tracing there appears at the top of the tracing a notation.

Q. Are you referring to that pencilled notation way up on the top? A. That is correct.

Q. Just what does that say?

A. That pencilled notation which is shown on the tissue paper tracing but not on the blueprint says: "Revision okayed by L. C. Keller." The date that is on there is "9/26/"—the rest of it is "47."

Q. That is not your writing?

A. That is not my writing.

Q. Can you tell us whether this is a blueprint that is taken from the tissue, or how do these plans work; is the tissue drawing taken from the blueprint? Which way does it work, Mr. Parks?

A. The blueprint is made from the tissue paper tracing. [161]

Q. Then as far as you know, this is a blueprint from that tissue tracing, except for the pencilled notation on the top? A. That is correct.

The Court: What is that blueprint exhibit?

(Testimony of Eugene H. Parks.)

Mr. McPharlin: That blueprint is Radkovich's Exhibit I.

The Witness: Might I bring up a question at this time?

Mr. McPharlin: Well, yes; go ahead and ask it, Mr. Parks.

The Witness: I believe that there is a discrepancy on this date that is signed by Mr. Keller of September the 26th, 1947, at the top of this.

Q. (By Mr. McPharlin): How do you mean? Explain, Mr. Parks.

A. I don't believe that was "9/26/47." I think that was "8/26/47."

Q. Oh, I see.

A. Because the drawing was brought in to me with that "OK'ed" at the top, and that was 8/27 or 8/28 of '47 or thereabouts.

Q. That person who has his okay on that, is that some person in the U. S. Engineers' office or some person at Muroc, do you know?

A. I was told that Mr. Keller was the inspector on the job at Muroc, and that this revision had gone over—this drawing and the changes on it had gone over with Mr. Keller [162] and that Mr. Keller had okayed these changes.

Q. I see.

A. Now, that did not constitute acceptance by the Army; merely that the resident electrical inspector had okayed the changes on the job and this was to be submitted for the Army approval.

Q. I have here Radkovich's Exhibit D, which

(Testimony of Eugene H. Parks.)

consists of the group of back charges of Radkovich Company against Woolley. Were those prepared by you or under your supervision, Mr. Parks?

A. They were.

Q. I believe, Mr. Parks, that these consist to a large extent of electrical fixtures; isn't that correct?

A. That is correct.

Q. And then there is also a back charge which is listed here for pay roll made to electricians employed by Woolley on this job for the period from August 19 to September 8. Do you recall the circumstances as to why this pay roll was made by Radkovich Company?

A. I might ask a question there or see that, either one.

Q. Yes; you may see it.

A. As well as I can recall, Mr. Woolley was not in a position to continue to carry his pay roll any longer; and, as I recall, these men had previously or substantially all of these men had previously been in Mr. Woolley's employ. [163] In order to facilitate the prosecution of the work under the contract it was deemed advisable, due to the fact that Mr. Woolley could not carry his pay roll, that these men be put on our pay roll and paid for their work as our employees, and that the resultant charges would be considered a back charge against Mr. Woolley.

Mr. Benedict: Is that one of the items that we concede, Mr. McPharlin?

Mr. McPharlin: I do not recall.

Mr. Benedict: If you want my dates here on

(Testimony of Eugene H. Parks.)

these back charges, we will save time.

Q. (By Mr. McPharlin): What was the amount of that item?

A. \$612.72.

Mr. Benedict: We concede that, January 31, 1949.

Mr. McPharlin: I am sorry, I do not have a copy of that list that you concede.

Mr. Benedict: Here is my copy, if you want it.

Mr. McPharlin: Well, if that is the only copy you have, I won't take it from you.

Q. Mr. Parks, we have had some discussion here about pull-chain fixtures. Do you know whether or not those pull-chain fixtures were purchased or paid for by Radkovich, and are they in those back charges?

A. Yes; those pull-chain lights are in the back charges against E. B. Woolley, that is, the materials for them. In [164] other words, when I purchased the materials and shipped those materials to the job.

Q. Could you show us in that list there where those pull-chain fixtures are?

Mr. Benedict: In order to save time, would that be November 4, 1948?

Mr. McPharlin: Those were not conceded, were they, Mr. Benedict?

Mr. Benedict: No, they were not conceded. I am merely trying to shorten it, is the only reason I mentioned it.

The Witness: Are you referring to November the 4th?

(Testimony of Eugene H. Parks.)

Mr. Benedict: Yes; the back charge dated that date.

A. There is one back charge on November the 4th, page 2, for a total of \$62.52, in which two items of that are for porcelain pull chain at 50 cents each, a total of a dollar. I can't find it offhand in here, but I am sure there is in this list the balance of those 100 pull-chain receptacles.

The Court: What is the total of that item?

The Witness: Of the amount, sir?

The Court: Of the back charge on that item?

The Witness: It would be difficult, your Honor, to dig it out of here. The total back charge on that one item I just referred to for those pull-chain lights, there were only two of them.

The Court: Just for the material? [165]

The Witness: Just for the material of the porcelain pull-chain.

The Court: You said \$62.52 of material. Was that the total back charge of that item?

The Witness: Just a moment, sir. That was \$62.52, of which one dollar of that was for two porcelain pull-chain ceiling lights. There appears elsewhere in this affair here the balance of those. As I recall, those two were purchased to replace some that were either broken, damaged or otherwise removed or lost from the job.

Q. (By Mr. McPharlin): How much did each one of those pull-chain fixtures cost; can you tell us that?

A. My cost on those was 50 cents apiece.

(Testimony of Eugene H. Parks.)

The Court: Is there any credit on there for the fluorescent?

Q. (By Mr. McPharlin): Were there any deductions in there for fluorescent lighting? Of course, that consists only of back charges against Woolley, is that correct?

A. That is right; and no credit has been given for the deduction of fluorescent lighting fixtures in this back charge computation here.

Q. Do you know the cost of fluorescent fixtures?

A. No. I am in the same position that Mr. Ferguson is put in. It would depend upon the type of electrical fluorescent fixture that was to be furnished, and they could carry [166] any price from a very nominal sum to a very expensive sum.

Q. You have in the back charges, do you not, an item of back charge consisting of labor paid to Drury Electric Company?

A. That is correct.

Q. What is that back charge of payment to Drury Electric Company for?

A. In amount or for what?

Q. What is it for, and the amount, too, if you have it?

A. That back charge was compiled from a statement of charges made to us by Mr. Anderson of Drury Electric Company, after Mr. Woolley refused to perform under his contract and it became necessary for us to bring in another electrical subcontractor to replace Mr. Woolley and Mr. Woolley's personnel, and Drury Electric Company was the

(Testimony of Eugene H. Parks.)

subcontractor that performed that work and replaced Mr. Woolley during and between the periods covered by this back charge.

Q. Then Mr. Woolley, shortly thereafter, did come back on the job, is that correct?

A. That is correct.

Mr. McPharlin: You may cross examine.

Cross Examination

Q. (By Mr. Benedict): Mr. Parks, I believe you were in charge of giving Mr. Woolley notice to proceed on the job, were you not? [167]

A. No.

Q. Actually——

A. Let me correct myself there. I do not think that I was the one who actually gave Mr. Woolley the written notice to proceed. You are asking me questions two and one-half years old. If you could show me that notice to proceed that Mr. Woolley received, I could tell you whether it was my signature or not.

Q. I show you Woolley's No. 1 and ask you if that refreshes your recollection on that point?

A. I did not sign this letter and I did not mail this notice to proceed to Mr. Woolley.

Q. Do you know whose signature that is on there?

A. It would be difficult to state, but the only other person in the office other than Mr. Radkovich, myself, and Marge Collins, those are the only three that I know of who were actually signing Mr. Rad-

(Testimony of Eugene H. Parks.)

kovich's signature, that is, practically. It is not my signature. I believe that it appears to be Marge Collins'. It does not seem to be Mr. Radkovich's.

Q. Did you dictate the letter before it went out?

A. No. This letter is a standard form letter. The only thing we would change in this would be the addressee and the date. All of these letters that went out to subcontractors as notices to proceed were handled in the same manner. [168]

Q. I see. Isn't it true, Mr. Parks—

May I have Defendant Woolley's for identification—I do not recall the number. We had one we introduced this morning just for identification.

I show you Defendant Woolley's for identification No. 6 and ask you if that refreshes your recollection as to whether or not there was not a revised plan turned in to the Government for approval before the turning in of Radkovich's No. 1 and the tracing that you are testifying about?

A. I have never seen Woolley's Exhibit 6 before.

Q. Neither the copy nor the original of it? You do not ever remember it?

A. I have never seen the original or the copy before, unless this—is this a photostat of a blueprint?

Q. It is a photostat of a drawing.

A. Of a blueprint or a drawing?

Q. Well, that I could not say. I am not sure, myself. Let me show you something else. I show you another drawing, dated "8/27/47" and ask you if you have any recollection regarding that one?

(Testimony of Eugene H. Parks.)

A. No; I have never seen this drawing before.

Q. Mr. Barrington was in charge, was he not, on behalf of the Radkovich Company, of working with subcontractors on these shop drawings?

A. Only at the beginning of the job. [169]

Q. Yes. Well, that was when the shop drawings were called for, was it not, at the beginning?

A. That is when they were called for.

Q. Does it refresh your recollection at all that Mr. Woolley did not come to your office with Mr. Higuera for the purpose of going down to the Government's office to have a drawing approved, but that he came to your office after he had been handed a drawing, a revised drawing, that had been approved by the Government, and his complaint was as to the extras called for on the drawing?

A. Your question to me—phrase that again.

Mr. Benedict: Would you read, it, Mr. Reporter?

(Question read by the reporter.)

A. That is not the condition of Mr. Woolley's and Mr. Higuera's appearance at my office with this tracing.

Q. In other words, your testimony is still the same? A. My testimony is the same.

Q. All right. In other words, when they came to your office the drawing had not been approved by the Government?

A. That is correct, not the drawing referred to as Radkovich's No. K.

Q. Yes, I understand. And you say they brought this tracing in themselves? A. That is correct?

(Testimony of Eugene H. Parks.)

Q. And do you know where they got it from?

A. They came to my office from the job at Muroc. It is my understanding that the drawing was prepared on the job at Muroc, but by who it was prepared—by whom it was prepared I do not know.

Q. Do you know whether it was prepared by Mr. Barrington or not?

A. By Mr. Jim Barrington or Mr. Gene Barrington?

Q. Well, I did not know there were two. Whichever Barrington that you said was the architect in charge of these matters?

A. Mr. Barrington was not an architect; he was an architectural draftsman.

Q. Well, architectural draftsman.

A. Are you asking me my personal opinion or are you asking me for the fact?

Q. I ask you do you know; do you know whether or not he prepared it? A. No; I do not.

Q. You do not know. Did Mr. Woolley say to you who had prepared it when he brought it in?

A. I don't recall Mr. Woolley making a statement as to what person or persons had prepared this tracing.

Q. He did advise you, however, that it called for extra fixtures that he had not contemplated, did he not?

A. Mr. Woolley and I—I have already made the statement [171] to that effect. My statement stands the same. Mr. Woolley and I did discuss the additional items which were not called for or shown on

(Testimony of Eugene H. Parks.)

the original contract drawing but which this revised plan did show.

Q. And he objected to those extras on there, did he not, what he considered extras?

A. That is correct.

Q. What was the purpose in going down to the Government engineer, in view of the fact that Woolley objected to this drawing? What was the purpose of going down there?

A. Mr. Woolley was the one who brought the drawing in. It was a necessity, before Mr. Woolley could proceed any further with his work on the job, that it be necessary to have Government approval of the work that he contemplated doing. That would be in accordance with the specifications for his section of the work. He would be proceeding at his own risk if he did not obtain the approval on this drawing.

The Court: Is that in evidence, that drawing?

Mr. Benedict: This tracing is, your Honor; yes.

The Court: The tracing is.

Mr. Benedict: There is one here that I have shown the witness that he knew nothing about, that has not yet been introduced.

The Court: Which one is this that is in evidence?

Mr. Benedict: That is Woolley's No. 6 for identification. [172]

Q. The back charges on the drop lights only consisted of a \$50.00 item, isn't that true?

A. I don't recall.

(Testimony of Eugene H. Parks.)

Q. Fifty cents apiece for 100 of them?

A. My cost on it is shown by the back charge there. I found one where two of them were involved for the amount of a dollar. There would be \$49.00 shown somewhere else.

Q. I believe I can show you the rest of them. I show you invoice dated November 4, 1948, under the heading of "Equipment"—"Closet—98 only—No. 544-1 light brackets-porcelain w/pull chain at .50 each \$49.00." And they you have already testified to the other two, I believe, have you not? That made a total of?

A. \$50.00; that is correct.

Q. This back charge of November 5, 1948, that you have testified to of payment made to Drury Electric Company, that was during the approximately a week, was it, that Woolley was off of the job?

A. I don't recall the exact dates between that, but my back charges here state and show in the back charges between what days this back charge covers. Does that answer your question?

Q. Isn't it an item that occurred during the time that Woolley was off the job?

A. That is correct. [173]

Q. That is what I meant.

A. That is correct.

Q. Has Radkovich Company actually paid this company this amount?

A. I compiled this statement of charges from Drury Electric's statement to us of charges. As far

(Testimony of Eugene H. Parks.)

as I know, Drury Electric Company has been paid for this work that was performed, but I do not have access to those records and could not definitely state that they have been paid. But I believe that Radkovich's records will show whether it has or has not been paid.

Mr. Benedict: That is all.

Cross Examination

Q. (By Mr. McCall): I believe you say, Mr. Parks, you had nothing to do with the payment of Mr. Woolley on the job?

A. That is correct, except that I requested of all of the subcontractors, including Mr. Woolley, I believe—and I believe my correspondence file under the Woolley subcontract will bear this out—that I requested the subcontractors to adhere to the instructions that were given to them in their notice to proceed and subsequent instructions, to submit an estimate each month of what their charges for the month's work was; and it was my responsibility to see that those estimates got to the resident engineer in time to prepare his cost break-down [174] or estimate of the work of the general contract. That as far as any responsibility other than that, I didn't have any responsibility insofar as payments to the subcontractor or determining what the amounts to be paid to the subcontractor were.

Q. You handled the correspondence, then, did you, Mr. Parks?

A. Not all of the correspondence, because Mr.

(Testimony of Eugene H. Parks.)

Radkovich had a personal secretary who handled a lot of his personal correspondence, quite a bit of the correspondence pertaining to jobs I handled.

Q. I show you the Glens Falls, surety for Mr. Woolley, Exhibit 8 and ask you if you remember getting that letter asking for information?

A. I recall receiving a letter from your office.

Q. I show you what purports to be an acknowledgment of that letter and ask you if you signed that? A. I did.

Q. That is Glens Falls' Exhibit 9. Did you ever give to me for the Glens Falls the information requested in Exhibit 8? A. I did.

Q. And do you have a copy of that in your files?

A. I don't have a copy of that in the files. I made pencilled notes of the telephone conversation that I had with [175] you personally, and due to the fact that there was a conflict between the subcontractor and the prime contractor, most of the correspondence was being handled through or by the respective attorneys, both Mr. Benedict for Woolley and Mr. Shafer for the Radkovich Company, and before I gave the information to you over the phone I contacted Mr. Shafer who gave me the authorization to give the information directly to you. That was to expedite your—giving it to you over the phone was to expedite you, and you specifically asked for the information requested in your letter, I believe. You did not have a copy of the letter in front of you, but that you got a copy from the file and asked me the questions in the time between

(Testimony of Eugene H. Parks.)

the time I received your letter. If I am not mistaken I answered your letter right away and told you that it would take several days to compile that information, as I had to check with—for one thing, I had to check with Westinghouse Electrical Supply in order to determine what the status of that account was, how much Woolley had paid them and how much was still balance. Do you recall that conversation?

Q. With you? A. Yes, sir.

Q. No. Did you ever see me before today, Mr. Parks? A. Yes, sir.

Q. Well, when was that?

A. I am positive I saw you when we had a meeting—Mr. [176] Shafer was present—regarding this whole matter in 1948, or '49.

Q. At what time? A. Don't you remember?

The Court: Well, you will answer counsel's question.

Q. (By Mr. McCall): Who was present there then, Mr. Parks, at the time?

A. I don't recall.

Q. Was Mr. Benedict present?

A. I don't recall.

Q. Was Mr. Woolley present?

A. I don't recall.

Q. Well, will you state to the Court how you happen to remember that you had a conference with me in Mr. Shafer's office, and you can't remember who else was present?

A. I remember meeting you before, Mr. Bene-

(Testimony of Eugene H. Parks.)

dict—Mr. McCall, in regard to this matter.

Q. Is that the meeting in your attorney's office, Mr. Shafer's office, you are speaking of?

A. I don't recall whether it was in his office or whether it was in your office, but I have met you before personally in regard to this matter when other people were present, but I don't recall who they were.

Q. Nor where it was? A. No. [177]

Q. Nor when it was? A. That is correct.

Q. But this letter, Exhibit 9, states, the last two lines: "We will obtain the information and forward it to Mr. Shafer who will in turn forward it to you." And that is dated June 21, 1948. Did you ever forward the information to Mr. Shafer?

A. I don't recall whether my correspondence records would indicate that I transmitted the information that I gave to you over the phone to Mr. Shafer.

Q. Do you know the date that you gave the information to me over the phone that you mentioned?

A. It would be within a week after I wrote that letter to you in answer to your letter to me.

Q. And do you have any memorandum that indicates that you had such a telephone conversation with me?

A. I believe I have memoranda that I made at the time that I made a telephone conversation—I had a telephone conversation with you, at which time I gave you the information that you requested.

Q. Was that the first time you ever had a telephone conversation with me? A. I believe so.

(Testimony of Eugene H. Parks.)

Q. And you had never seen me before that time?

A. I don't recall whether I had seen you or met you at your office or Mr. Shafer's office.

Q. But at any rate, you never did answer this letter of June the 11th by another letter, in person, nor anyone in your office?

A. No; I can't state that I did not answer that letter, because I think that my contract files will show whether I did or did not answer that letter by another letter.

Q. And if you did answer it by another letter, then about what time would it have been sent?

A. I do not recall.

Mr. McPharlin: May we show the correspondence file to this witness?

Mr. McCall: You are asking me? I don't know what you can show the witness.

Mr. McPharlin: He is asking the witness about dates. We have a correspondence file which is in evidence.

The Court: You may hand it to the witness and he may refresh his recollection.

Mr. McCall: Why, certainly.

The Court: We will take a few minutes recess.

(Short recess.)

Q. (By Mr. McCall): Mr. Parks, did you ever find out the identity of the party you thought was me?

A. Are you referring to the telephone conversation I had [179] with you or the person that I met,

(Testimony of Eugene H. Parks.)

the statement that I referred to that I had met you previous to this time?

Q. Well, just any part of your testimony with reference to talking to me.

A. I recall having a telephone conversation with you in which and during the telephone conversation with you I gave you the information you had requested in your letter. In fact, when I called you I told you who I was and what company I was calling for and the matter that I was calling about in answer to your letter, you told me to hold on the phone just a moment. That is when I picked up a piece of paper to make a record of what I said to you. And I think the purpose of your holding me on the phone for that period of time was in order to make a transcript of what I was saying to you. That is what I believed at the time. That is what I still believe.

Q. But you did not know about that?

The Court: How important is that conversation?

Mr. McCall: Your Honor, I never saw the man before, never talked to the man before, and he has said here that he did, and I have no answer to the letter asking for the information which they were complaining about in the letter of June the 10th, 1948.

The Court: I think the important part of it is the information that you wanted, whether you re-received it or whether you did not.

Mr. McCall: That is right; which I did not get.

(Testimony of Eugene H. Parks.)

Thank [180] you, no other questions.

The Court: All right.

Q. (By Mr. McCall): But I understood you do have some explanation to the Court about the identity of the man you thought you had a conference with?

A. I stated, "I believed," or I said, "I believed that I had met you," or that I definitely had met you before.

The Court: Well, it does not make much difference. If you can answer the question, go ahead and do it, shorten this up.

A. I can't definitely state that I have met this gentleman before, although I believe that I have met him before in regard to this, but I can't prove it.

The Court: But you do state that you had a telephone conversation with him and that you gave him information over the phone; is that what you state?

The Witness: Yes, sir.

The Court: All right.

Mr. McCall: That is all, thanks.

Mr. McPharlin: I have a few questions.

Redirect Examination

Q. (By Mr. McPharlin): Mr. Parks, I call your attention to Radkovich's Exhibit F, which consists of a correspondence file, and I direct your attention in that correspondence file to a [181] letter dated July 8, 1948, addressed to "E. B. Woolley," with a carbon copy to the Glens Falls Indemnity Company; and you will also note that there is a post office re-

(Testimony of Eugene H. Parks.)

turn receipt attached to this letter, dated July 13, 1948, showing that one Angelo Woods signed this on behalf of the Glens Falls Indemnity Company as having received this letter, and ask you if you are familiar with that letter?

The Court: July the 8th, is it?

A. July the 8th, 1948. Yes; I have seen the letter and am familiar with the letter.

Mr. McPharlin: I would like to read this letter in the record, and it is in reference to the point that Mr. McCall has been bringing up. It is dated; to "E. B. Woolley;" subject is "Contract."

"Dear sir:

"Reference is made to letter dated June 10, 1948, from Mr. Radkovich directed to your attention regarding breach of your subcontract due to your failure and refusal to perform the obligations by said subcontract provided to be performed by you, and because of said nonperformance and stoppage of work on your part, it was considered that you were in default under the provisions as set forth in your subcontract. Some time after June 10, 1948, upon instructions from your legal advisors, you put your personnel back on the job [182] to continue performance under the terms and provisions of your subcontract.

"Certain conditions have again been brought to our attention that your organization is not performing on the following phases of work covered by your subcontract:

"(a) Installation of electrical fixtures.

(Testimony of Eugene H. Parks.)

“(b) Installation and hook-up of electric wall heaters.

“(c) Installation of switch plates and electrical trim.

“(d) Installation and hook-up of buzzers and door chimes for signal system.

“In view of the fact that the contractor does not consider that you have sufficient personnel on your pay roll to satisfactorily prosecute the work required on the installation of the above items, we are notifying you to put on such additional personal to adequately take care of these operations, or the contractor will be forced to put on electrical personnel of his own and back charge you for any labor costs incurred.”

And that letter contains signed return receipts from the post office department showing receipt by Woolley and the Glens Falls Indemnity Company.

Q. Also, Mr. Parks, in reference to Radkovich Exhibit F I will show you letter from the United States Engineers office [183] dated March 19, 1948, addressed to “Wm. Radkovich Company, Inc.,” and ask you to state whether or not you are familiar with that letter. A. Yes.

Q. And that was received by the Radkovich Company? A. Yes.

Q. In the mail? A. That is correct.

Mr. McPharlin: This is very short. I would like to read this. It is from the United States Engineers to Radkovich Company, Inc.:

(Testimony of Eugene H. Parks.)

“Gentlemen:

“Reference is made to our letter dated 16 March 1948, relative to the approval of materials. Following is a supplemental list of materials which your office has not submitted for approval:

“(a) Light fixtures.

“(b) Door chimes.

“It is requested that you notify this office without delay what you propose to furnish under each item listed above.”

It is signed “W. J. Leen, Chief, Operations Division.”

Q. Mr. Parks, on this date, March 19, 1948, had Mr. Woolley furnished you with a list of light fixtures and door chimes?

A. To the best of my knowledge, to that date he had [184] not furnished the list to us.

Q. I will show you in this same exhibit a letter from the War Department Corps of Engineers, dated April 5, 1948, addressed to “Wm. Radkovich Company, Inc.,” and ask if that was received in the office of the Radkovich Company?

A. That is correct.

Mr. McPharlin: I would like to read this very brief letter. It is addressed to Wm. Radkovich Company from the War Department Corps of Engineers. It states: “Gentlemen:”——

Mr. McCall: May it please the Court, I would object to that as hearsay insofar as my client Glens Falls is concerned. There is no foundation laid for it and I do not know what it is. I have no copy of it.

(Testimony of Eugene H. Parks.)

The Court: All right; show it to counsel.

Mr. McCall: I have never seen it. (Examining document.) Since it does not affect my client any, I have nothing further to say.

Mr. McPharlin: This letter addressed to "Wm. Radkovich Company, Inc., states:

"Gentlemen:

"This office has been advised by higher authority that the contractor shall furnish and install all light bulbs that are required under the above subject contract, Temporary Family Quarters." [185]

It is signed "R. E. Fergason Resident Engineer."

Q. I will show you another letter from Department of the Army Corps of Engineers, dated May 18, 1948, and ask you if that letter was received in the mail by the Wm. Radkovich Company?

A. Yes; it was.

Mr. McPharlin: This letter from the Department of the Army Corps of Engineers, addressed to "Wm. Radkovich Company, Inc., states:

"Gentlemen:

"Your proposed schedule of electrical fixtures to be installed in the Temporary Family Quarters being constructed at Muroc Air Force Base, Muroc, California, has not been received by this office.

"Unless your proposed schedule of electrical fixtures is received on or before 1 June 1948, the Contracting Officer (as provided for by paragraph 15-03 c of the contract specifications) will select a schedule of electrical fixtures. Paragraph 15-03 c reads as follows:

(Testimony of Eugene H. Parks.)

“ ‘If the contractor fails to submit for approval within the specified time, a list of materials, fixtures and equipment in accordance with the preceding paragraph, the contracting officer will select a complete line of materials, fixtures and equipment. [186] The selection made by the contracting officer shall be final and binding and the items shall be furnished by the contractor without change in contract price or time of completion.’

“For the District Engineer:

Very truly yours,

/s/ W. J. LEEN,

Chief, Operations Division.”

Q. On the date of this letter, May 18, 1948, had Woolley furnished the Radkovich Company with the list of electrical fixtures?

A. To the best of my knowledge, to that date he had not furnished a list of electrical fixtures.

Mr. McPharlin: No further questions.

Mr. McCall: May I ask one more question, please?

Recross Examination

Q. (By Mr. McCall): Mr. Parks, you stated a while ago that you might have in your files a letter in reply to the one that is in evidence here as the Glens Falls' Exhibit No. 8, is that right?

A. Would you read me what I stated in regard to that?

(Testimony of Eugene H. Parks.)

Q. Well, to save time, you did state that you had data from which you gave me the information on the telephone in reply to that letter, is that correct?

A. That is correct. [187]

Q. Now, if we do not close this afternoon could you bring that data, any letters in connection with replying to that letter, back to court tomorrow morning?

A. Mr. McCall, you have put me in this position: In that I personally do not have any of the records that I kept for the Radkovich Company. All of the records which I made during my employ with the Radkovich Company were retained and kept by the company. When I left their employ I do know that all of the records that I kept were there.

Q. Then you can find it, I presume?

A. Now, if those records have been kept in the order that I had them, I would say yes; but I can't state whether they have kept those records or not.

Q. Will you make a search for any data in reply to that letter, Exhibit 8? A. Will I?

Q. And try to bring it here to court tomorrow morning?

A. How would I make that search, sir?

The Court: Can't you ask counsel to produce it if he can find it?

Mr. McPharlin: Mr. McCall, if you want us to conduct a search through Mr. Radkovich's records, why, we can do so.

Mr. McCall: Well, I certainly would appreciate it, because I would like to have some evidence to

(Testimony of Eugene H. Parks.)

back up the witness's testimony. [188]

Mr. McPharlin: Yes. All right, then, this evening I will have a check made to see if we can locate these records that Mr. Parks has referred to and let you know, and bring them in if we can find them.

Mr. McCall: Thank you.

The Court: Can you recollect on what kind of paper you put these notes? Were they on an envelope?

The Witness: They were on paper.

The Court: So as to assist counsel in trying to find them.

The Witness: Do you want me to give him that information, sir?

The Court: I say, can you?

The Witness: Yes, sir. Nearly all of my notes were made on the same type paper, the same type you have in that pad.

The Court: White paper or yellow paper?

The Witness: No; most of it was on yellow paper, yellow pads. Would you hold up your paper, sir?

Mr. McPharlin: Yes; I know.

The Court: At any rate, you are going to give counsel all the assistance you can on that. Anything further?

Q. (By Mr. McCall): Could you state to the Court, then, Mr. Parks, from where you got the information which you put on your notes before you gave it to me on the telephone?

(Testimony of Eugene H. Parks.)

A. I believe so. One of the organizations that I [189] contacted to obtain the information was—I believe it is the Westinghouse Electric Supply. I contacted them to find out what the exact amount was that they claimed was due them under the Miller Act. I contacted them also to find out exactly how much Mr. Woolley had paid to them for materials which he had bought for this job. I contacted our files from Mr. Flobeck's records, I believe to find out how much he had been paid to date. I contacted our correspondence file, which you have seen submitted here, to refer to other questions or to answer other questions that you asked.

Q. Then the source of the information which you put on your notes and gave to me on the telephone, as you testified, is still available, then, if the notes are destroyed?

A. That question I can't answer, Mr. Benedict (Mr. McCall) because I don't know whether those records are still available. I am sure that for one part of it, the records would indicate that the information that I got from the Westinghouse Electric Supply in regard to that question are. I think our records——

Mr. McCall: I understand from your counsel he will bring in everything tomorrow morning that may be found in answer to that letter which is in evidence as Exhibit 8. There are no further questions.

The Court: Anything further of this witness?

Mr. McPharlin: Nothing further. [190]

Mr. McCall: Nothing further.

The Court: You may step down.

Mr. McPharlin: Radkovich and his sureties will rest, your Honor, with one exception. There was another witness that would have been very brief, that I had on call from San Diego, your Honor. I understand he was a contractor who had some difficulties and he did not make it. If he does arrive here later, while this is still in progress, I would like the opportunity to call him out of order. It will be very brief.

The Court: Very well.

Mr. Benedict: Woolley is ready to proceed, then, if the Court please. Will you take the stand, Mr. Woolley?

Mr. McPharlin, I have some letters which you have examined which I would like to introduce—there is a group of them as Mr. Woolley's next exhibit.

EDWIN B. WOOLLEY

a defendant, cross-defendant and cross-complainant, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Edwin Woolley.

The Clerk: Is your middle initial B?

The Witness: Yes, sir.

The Clerk: Are you offering them, Mr. Benedict?

Mr. Benedict: I am offering this in as one exhibit, a [191] group of letters fastened together.

The Clerk: Are these admitted, your Honor?

(Testimony of Edwin B. Woolley.)

The Court: They may be received.

The Clerk: Defendant Woolley's Exhibit 10 into evidence.

Mr. Benedict: At this time, too, if the court please, I would like to dispose of one other preliminary matter which I discussed with Mr. McPharlin. Through inadvertence our cross-claim in this matter, on page 7, contains two erroneous figures. It does not change the prayer of our complaint in any way, and I would like permission at this time to amend the two figures on page 7 by interlineation.

The Court: What are those?

Mr. Benedict: On line 28, change the figure "\$82,875.53" to "\$99,052.11.

The Court: Change the figure of what?

Mr. Benedict: "\$82,875.53." That is on line 28.

The Court: Yes. To what?

Mr. Benedict: "\$99,052.11." And on line 30, the figure "\$37,425.26" to "\$53,601.84."

I also have one correction in a date on page 8 and page 9. On page 8, line 29, I would like permission to change the date "September 1, 1947" to "August 28, 1947."

On page 9, line 1, the date "September 1, 1947" to "August 28." [192]

The Court: I think it would be better if you would file an amendment showing the changes.

Mr. Benedict: Would your Honor prefer that I rewrite it or simply rewrite the paragraphs involved?

(Testimony of Edwin B. Woolley.)

The Court: No; you can write a memo showing the changes you desire to make.

Mr. Benedict: Yes. Well, I will do that, then, your Honor. That is all of them, simply the dates and those two figures.

The Court: So that it can become a part of the pleadings and part of the files, amend in the particulars that you have called to the court's attention.

Mr. Benedict: Yes; I understand. I will file that in the morning, then, if that is agreeable.

Mr. McPharlin: That is satisfactory with us.

Direct Examination

Q. (By Mr. Benedict): Mr. Woolley, when did you first meet Mr. Radkovich?

A. When I was wiring his home sometime in July, 1947.

Mr. McCall: Mr. Woolley, I am unable to hear you over here.

Mr. Benedict: Will you speak up a little louder, please?

A. Around July, 1947.

Q. Did you have a discussion with Mr. Radkovich relative to your taking a subcontract on the Muroc job for electric [193] work?

A. Yes. He asked me to come over——

Q. No; I have not asked you for the discussion, please. In connection with that discussion did he give you anything upon which to figure out your bid?

(Testimony of Edwin B. Woolley.)

A. Yes; he gave me a plan and set of specifications.

Q. I show you Woolley's No. 5 in evidence and ask you whether or not that is the drawing Radkovich gave you at that time?

A. That is the drawing.

Q. Did you base your price for the electrical work on this drawing? A. That is right.

Q. Did he also give you any specifications?

A. Yes; he gave me a set of specifications.

Mr. McCall: Louder, please, Mr. Woolley.

Mr. Benedict: Speak up louder, Mr. Woolley, if you will.

The Witness: All right.

Q. (By Mr. Benedict): I show you Radkovich's No. B in evidence and ask you if he gave you a set of specifications that are a duplicate of this exhibit?

A. Yes; he did, except for this first part here. The War Department Contract was not on it.

Q. He did not give you, then, a copy of his prime contract with the Government? [194]

A. No, sir.

Q. Did you ever have a copy of that contract before you entered into the subcontract with Radkovich? A. No, sir.

Q. Did you ever see a copy? Did you ever read a copy of it? A. No, sir.

Q. In reference to fixtures on the job, Mr. Woolley, will you state whether or not there are any type numbers for fixtures indicated on Woolley's

(Testimony of Edwin B. Woolley.)

No. 5? A. No, sir.

Q. That you were given at that time?

A. No, sir.

Q. In arriving at your price of your subcontract did you take into account the price of any fixtures?

Mr. McPharlin: I will object, your Honor, as incompetent, irrelevant and immaterial. He has a written contract, plans and specifications.

The Court: I believe that is correct.

Q. (By Mr. Benedict): Thereafter you entered into the subcontract that is before the court, did you not, with the Radkovich Company?

A. Yes, sir.

Q. Thereafter, will you state whether or not you received notice to proceed on your work. [195]

A. I did.

Q. After you received that written notice to proceed, did you report to anyone on the job site?

A. Yes; I did, to Ted Thompson, who was his superintendent.

Q. What instructions did you receive, if any, from Ted Thompson as to when you should commence operations on the job?

A. He said they were going to commence right away, and to ship my materials there and be ready to go around the 15th of the month.

Q. What month was that?

A. August, 1947.

Q. Will you state whether or not you were at the job site on August 15, 1948?

(Testimony of Edwin B. Woolley.)

A. I was there personally; yes, sir.

Mr. McPharlin: 1948, Mr. Benedict?

Mr. Benedict: '47. Excuse me.

Q. When, if at any time, did you first have a crew of men at the job site?

A. I had a crew of men ready to work on August the 28th.

Q. Do you have your payroll records with you?

A. I do.

Q. Can you tell us from examining those payroll records when you commenced operations under your subcontract? [196]

A. It was about October the 4th, I think.

Q. And why didn't you start before that date?

A. Well, the Radkovich Company couldn't get their aggregate passed and they didn't have their forms set up.

Q. From August 28, 1947 until about October 4, 1947 would you state whether or not you had a crew of men on the job? A. I did.

Q. Will you state whether or not during that period of time they were able to do any work?

A. No. They prefabbed a little pipe, but then it come up to these changes and the routing of the pipe, and so we had to stop prefabbing pipe because we didn't know, until the army approved, what the changes were going to be, whether they were going to approve the changes or not.

Q. Do you know how many days that they prefabricated, approximately?

A. No; I can't say. It wasn't—no; I can't say.

(Testimony of Edwin B. Woolley.)

Q. Do you have any estimate of how many days it might have been?

A. It could not have been over a week, because as soon as I found out there had to be changes I went right back up there and just told them to stop until I got it straightened out.

Q. From your payroll records can you state what your [197] payroll was from August 28th to October 1, 1947? A. \$1,149.22.

Q. How much of that period would you estimate, or, rather, how much of that amount would you estimate included productive labor in prefabricating? A. At the most, \$200.

Q. While you have your payroll records before you, Mr. Woolley, will you also examine them and tell the court the amount of your payroll from April 15, 1948 to the date that you completed your subcontract? A. It is \$15,027.36.

Q. And up to what date does that amount cover?

A. Up to October 6, 1948.

Q. Was that the date that you completed your subcontract?

A. Yes; that was the date I completed.

Q. After you arrived at the job site, will you state whether or not you were supplied a shop drawing or a work drawing by anyone?

A. Yes. I took the original drawings that I had to the architect on the job—who was not Jim Barrington; it was Bob somebody worked out of Barrington's office; I don't remember his name—and there was some location changes and it meant mov-

(Testimony of Edwin B. Woolley.)

ing the heaters because the cans were too large to put underneath the windows, and it meant moving some [198] pipes that could not be put in because the buildings were poured in two separate units and then there was a Gunitite partition poured between them, and it would be too hard to find your pipes after they were poured. So we made them service objections, and he said he couldn't change it without Keller's okay, and we got Keller, who was the chief electrical inspector, to give his okay to them, and we went and got this drawing up. He drew it and I approved it.

Q. You are now referring to Woolley's Exhibit 6 for identification? A. That is right.

Mr. Benedict: I would like, then, if the court please, to offer as Woolley's next exhibit his No. 6 for identification.

The Court: It may be received.

The Clerk: No. 6 for identification admitted into evidence as Woolley's Exhibit No. 6.

Q. (By Mr. Benedict): Did you commence wiring under the drawing that I have just shown you?

A. No, sir. It had to go into the army engineers to be approved. It was sent to Radkovich's office.

Q. When was the next thing that you heard in reference as to whether or not the drawing had been approved?

A. Well, actually, I didn't hear whether it had been approved or not. They sent me back another drawing and it was approved, but it had a lot of extra things on it. [199]

(Testimony of Edwin B. Woolley.)

Q. I show you, then, Radkovich's No. I in evidence and ask you if that is a copy of the approved drawing that you next received?

A. No, sir; that is not a copy of the approved drawing. That is a copy that evidently they sent in. That is the drawing, but it is not "approved" on that.

Q. It does not have the notation "approved" on it?

A. No, sir.

Q. I show you another drawing that bears the stamp "approved 26 Sept. 1947 for the District Engineer F. R. Cline," and ask you whether or not that was the drawing that was next given you?

A. That is right. This is the drawing that was next given me. This is a duplicate drawing, except it is stamped "okay."

Q. Do you recall about the date that this last mentioned drawing was handed you?

A. No. It was around the end of the month, I would say around the 30th.

Q. Of September?

A. Of September; that is right.

Q. At the time it was given to you do you remember whether or not it had the stamp of approval on it?

A. It did.

Q. That you have just testified to? [200]

A. Yes, sir.

Mr. Benedict: I would like to introduce this into evidence, if the court please, as Defendant Woolley's next in order.

The Clerk: Admitted, your Honor?

(Testimony of Edwin B. Woolley.)

The Court: It may be received.

The Clerk: That will be Defendant Woolley's Exhibit 11 into evidence.

Mr. McPharlin: Mr. Benedict, when did he state that was received.

Mr. Benedict: Towards the end of the month.

Mr. McPharlin: What month?

Mr. Benedict: September, 1947.

Q. When you received this drawing, Mr. Woolley, did you notice anything about it that it contained items that were not on the previous drawing that you had? A. Absolutely.

Q. What items were those?

A. Well, the addition of a telephone circuit, the addition of a three-way switch for the entry hall lights, the addition of two push buttons and chime circuit, and the addition of a pull-chain light in the living room closet, and the addition of this written down here at the bottom, "Chimes in Entry, Transformer in Distribution Panel", and a "note:" here, "Electrical Fixtures in accordance with [201] list to be submitted for approval."

Q. What, if anything, did you do after you were handed this drawing?

A. Well, I went right to Radkovich's office and talked to Parks and to Radkovich.

Q. And about when was that conversation?

A. About the 1st of October.

Q. Anyone else present besides the three of you?

A. I believe Higuera was with me at the time.

Q. Will you give us the substance of the con-

(Testimony of Edwin B. Woolley.)

versation that occurred relative to this revised drawing?

A. Well, I told Radkovich that I didn't approve of it and there was extras on it that I had never seen or never figured, and wanted to know what he was going to do about it. And he said, "I don't know. Parks, what are we going to do about it?" So Parks says: "I don't know. The other plan was approved. The Army okayed it. I don't know why we have to put this other stuff in."

So we went down to the Army Engineers' office to find out why they had added it. And, of course, I—

Q. Who went down to the Army Engineers'?

A. I believe just Parks and myself. I don't believe Higuera went with us.

Q. That was the same day?

A. That was the same day—it was the next morning. We [202] couldn't get to see the man down there. We called down there and made the appointment for the next morning.

Q. Do you know who you saw down there at the Army Engineers' office?

A. Well, we seen two or three of them. McCumber was the man that done the most and the architect down there.

Q. In your conversation to Radkovich and Parks did you point out the items that you claimed to be extras? A. I did.

Q. Will you state whether or not those are the same items that you have just testified to?

(Testimony of Edwin B. Woolley.)

A. They are.

Q. When you arrived at the Engineers' office did you have another discussion about these extras?

A. Yes; I did with Parks and with McCumber.

Q. What was said about them?

A. Well, I don't recall the exact conversation. McCumber said he knew nothing about the telephone; that was something that he had never seen there before, although they had approved it. And he said he didn't know who made the changes, but it was an approved copy and that was the one we would have to wire to. And I told him I was not going to do it because I had not figured the job that way. And he said, "Well, that is a matter that you and the prime contractor have to get together on. We don't recognize you at all as being in this office." [203]

Q. Did you have a further discussion then after that with Radkovich as to what was to be done about these so-called extras?

A. Well, in the same day but later in the week, why, we had to get going on it, so I went over to see him. And he said the army was going to take the job away from him if he didn't get started here. It had already been delayed for quite a while; for me to go ahead and wire to this plan and he would take care of the extras, he would pay me for them.

The Court: Who said that?

The Witness: Wm. Radkovich.

Q. (By Mr. Benedict): Did you thereupon pro-

(Testimony of Edwin B. Woolley.)

ceed with the performance of your subcontract?

A. I did.

Q. After you had started on the performance of your subcontract did you have any further conversations with Radkovich relative to your furnishing electrical fixtures?

A. Not until quite late in the contract. They sent me a letter asking for a brochure on the fixtures and I called Parks back and told him that I was not supposed to furnish the fixtures. And he said I had better come over and get together with Bill and him, and I did that, and that was quite an argument we had that day and wound up with Radkovich saying: "It is in the specifications. You are stuck with it and you are going to furnish them." Of course, I walked out pretty [204] hot, and I guess everybody was pretty hot that day. However, I went back again. Well, it turned out the same way, though. I mean we couldn't agree on the fixtures, and so he felt that I was supposed to supply them, and I felt that I was not; so it was just left at that until these letters came into effect.

Q. Did you actually install the fixtures?

A. I did.

Q. Do you have a statement from which you can testify, Mr. Woolley, as to the items which you claim constitute the extras for which you are suing here?

A. I do.

Q. Do you have an item down there for the cost of installing the fixtures?

A. I do.

(Testimony of Edwin B. Woolley.)

Q. And what is that item? A. \$4,800.

Q. Does that represent the actual cost to you in labor in installing the fixtures?

A. No; that is with the write-up.

Q. And how much would that be?

A. Let's see.

Q. Do you mean by that overhead and profit?

A. That is right. It is 1200 man hours at \$4.00 an hour. My actual cost, the actual wages to the men, was \$2.40, but then it is not exactly \$2.40, either, because you have 2.7 and 1 per cent and 2.18 per hundred. I never broke it [205] down that way. That is a legitimate write-up for profit and overhead.

Q. What item of overhead did you use on these extras, what percentage?

A. I think it was 15 per cent.

Q. What percentage of profit?

A. I believe 10 per cent.

Q. Now, Radkovich paid for the fixtures and you installed them; that is correct, is it not?

A. That is right, with an understanding that he was going to pay me for installing them.

Q. Did you have any additional understanding with him other than what you have testified to?

A. Well, later on, after he agreed to——

Q. When did you have a conversation with him in reference to his paying for your installing the fixtures, do you remember?

A. I don't remember the exact month, but it was after these letters come from the army saying

(Testimony of Edwin B. Woolley.)

they had to get in something to the army on what fixtures they were going to supply. He asked me if I would work that up for him, even though I was not going to pay for them. He said we would argue that out at the end of the contract who was going to pay for them. And I did work with the army engineers. They didn't have any plans that showed any fixtures that went in these [206] buildings. They never could find any, so they finally worked out something. They gave me, I believe it was two choices, and I contacted both companies and give a figure to Wm. Radkovich and he submitted it to the army.

Q. In Woolley's Exhibit No. 10 I show you a letter written by me to Wm. Radkovich Company giving a list of fixtures and light bulbs, and ask you if that was sent out under your authority?

A. It was.

The Court: Do you want to continue this evening?

Mr. Benedict: Well, I rather doubt it. I am pretty reasonably certain we ought to be able to finish by noon tomorrow, and it would be a help to me personally if we could adjourn now. I have got some things at the office.

Don't you think we can finish tomorrow?

Mr. McCall: I would think so, easily, by noon.

The Court: Very well.

Mr. McCall: Before we adjourn, if it please the court, I would like to ask opposing counsel if they will produce and bring to the court in the

morning all of the vouchers that they received from Mr. Woolley in connection with his payments on the estimates, the amounts which he claimed from month to month.

Mr. McPharlin: To save time, do you have copies? Does Mr. Woolley have copies? [207]

Mr. McCall: Yes; I have copies or one copy, but I would rather have the copy that is identified as the one received by Mr. Radkovich.

Mr. McPharlin: Oh, I don't think we have any dispute over that, although I have not attempted to go through Radkovich's voluminous files to select those out, Mr. McCall. You are going to want me to stay up all night.

Mr. McCall: If it is all right for me to use these, I will be glad to show them to counsel right now.

Mr. McPharlin: All right. Let us get together right after court adjourns. Maybe we can check over this.

Mr. McCall: The same ones I used on the deposition.

Mr. McPharlin: All right; let us do that.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m. of the following day, Friday, May 19, 1950.) [208]

Los Angeles, California,
Friday, May 19, 1950, 10:00 a.m.

(Case called by the clerk.)

The Court: You may proceed.

Mr. Benedict: Mr. Woolley, will you resume the stand, please?

E. B. WOOLLEY

Direct Examination—(Resumed)

By Mr. Benedict: At this time, if the court please, I would like to offer into evidence as Woolley's next exhibit in order his payroll summary sheets from which he testified yesterday, as one exhibit.

The Clerk: Admitted, your Honor?

The Court: What payroll was this?

Mr. Benedict: This was his payroll on the job in question.

The Court: On the entire job?

Mr. Benedict: Yes; that is right, your Honor.

The Court: It may be received.

The Clerk: That will be Mr. E. B. Woolley's Exhibit No. 12 into evidence.

The Court: Are there any portions of that payroll sheet that are involved here?

Mr. Benedict: It probably covers more than is really [211] involved, I think, your Honor. It is his complete payroll, as far as that is concerned. Of course, all we are really concerned with is the payroll up to the time he started and the payroll from

(Testimony of E. B. Woolley.)

April 15th, but I was putting in complete the record in any event.

The Court: I think you should mark those particular periods so that I can refer to those more readily. Otherwise the balance of it is on a contractual basis, is it not?

Mr. Benedict: Yes; that is right, your Honor, it is.

Q. Mr. Woolley, will you take Woolley's No. 12, and by dipping this pencil will you mark the sheets from which you gave the figures of your payroll up to the time you commenced?

A. Yes, sir.

Q. Perhaps the designation "W" up in the left-hand corner. That is the first page, the second page. First, it is just the first page and the second page for the payroll up to the time you started?

A. That is right.

Q. Now, will you mark the pages that cover the payroll from April 15 to the date of completion? That is pages 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and the witness has indicated with a "W" in the upper left-hand corner those particular sheets. A. Yes. [212]

Mr. Benedict: Mr. McPharlin, may it be stipulated now that the defendant Woolley's No. 6, this revised electrical plan, was part of the record that was obtained from the United States Engineers' office?

Mr. McPharlin: We have no information on that, Mr. Benedict, so I have no knowledge that I

(Testimony of E. B. Woolley.)

can stipulate by. We have the testimony, I believe, of the witness. I might say I have no contrary testimony, but I do not feel I can very well stipulate.

Mr. Benedict: I can state this: That this was one of the sheets—we did not introduce the sheet that Mr. Woolley stated was given him—we introduced this photostatic copy which came as part of the material furnished us from the United States Engineers' office pursuant to a request that we all made, and this is one that he sent us.

Mr. McPharlin: You want me to stipulate that this is a true photostatic copy of the original?

Mr. Benedict: That came from their office, was part of their files, part of the United States Engineers' files.

Mr. McPharlin: Oh, I will be willing to stipulate that this is a true photostatic copy of the original of which this purports to be a copy.

Mr. Benedict: Well, no; that does not quite reach the problem. What I wanted was a stipulation that this was supplied us by the United States Engineers' office from their [213] files.

Mr. McPharlin: Was it?

Mr. Benedict: It was, yes.

Mr. McPharlin: I will so stipulate, that the United States Engineers furnished you that copy from their files.

Mr. Benedict: All right.

Q. Mr. Woolley, do you recall an occasion when the matter of deleting the water heaters from the

(Testimony of E. B. Woolley.)

price of the subcontract came up?

A. Yes. I received a letter from them stating that they did delete the water heaters. That was the first I heard of it.

Q. Who was that letter from?

A. Well, the Radkovich Company.

Mr. Benedict: Mr. McPharlin, did you introduce that letter into evidence about the deletion of the water heaters?

Q. What did you do after you received this letter about the water heaters?

A. Well, I called the Radkovich Company on the phone. I don't remember whether I talked to Parks or to Bill Radkovich, but I told them that since I had figured the contract, why, I would give all the material to one supplier, practically, and they would give me a lot better price on the heater; and if they were going to contact them, I would like them to contact them at the price of \$55.10 a heater. [214]

Q. Did you have a commitment from another supplier for heaters at that latter price?

A. I did.

The Court: Are these heaters in controversy?

Mr. Benedict: Well, yes; they are in this respect, your Honor: That is the first item, I suppose, of dispute between the parties, that the contract price was \$80,000. Radkovich claims that \$6,100 should be deleted from the price because of the deletion of the water heaters by the Government furnishing them. We claim that the amount by

(Testimony of E. B. Woolley.)

which the contract should be reduced is a smaller amount than that, to-wit, the actual cost that Woolley claims that he could supply the water heaters; so that is about a \$700 item in that respect.

The Court: Yes.

Q. (By Mr. Benedict): What did the party at Radkovich Company that you talked to regarding the heaters say in response to your statement?

A. I believe I was talking to Parks, and he said he couldn't make any deal like that over the phone; I had to come over and see Radkovich. And I went over and I seen Radkovich, and he maintained that I told him at the start of the contract that the heaters would cost me \$61.00, and that is what he had told the army, and that is why they reduced it in that amount, and it was all done and final, and there was nothing I could do about it.

Q. Did you ever sign any instrument agreeing to a reduction to the price that Radkovich was claiming? A. No, sir.

Q. In any event you did not install the heaters, did you?

A. No, sir. Mr. Benedict, I hooked the heaters up. I did not install them. They were placed on the job and I hooked them up.

Q. Oh, I see.

The Court: Is that involved here?

Mr. Benedict: No; that is not involved, your Honor, that part.

Q. I show you Radkovich's D in evidence, being a list of back charges, and call your attention to

(Testimony of E. B. Woolley.)

the back charge dated November 5, 1948. Could you explain what that item is for?

A. That is 100 2-light ceiling fixtures.

Q. And that item, with tax, amounts to \$189.62, is that right? A. That is right.

Q. Do you know what fixture that refers to in reference to the wiring of the house?

A. Without looking at the plan, I think it is the kitchen light.

Q. In any event is it a fixture?

A. It is a fixture. [216]

Q. And that is one of the items that is not conceded, is it not? A. That is right.

Q. I show you another back charge dated November 5, 1948, reading "200—Wire Lamp Guards" total of \$65.60 including tax. What is that item?

A. Well, those wire guards went on the lamps in the entry hall.

Q. Are wire guards a part of the fixture?

A. Yes, sir.

Q. I show you the next one bearing the same date: "Freight on materials purchased and delivered to Muroc jobsite by Wm. Radkovich Co., Inc. 107 miles one way," etc., \$107.00. Do you know what that item refers to?

A. Well, I guess it is the fixtures going up to the job. That was quite a surprise to me because my truck was going back and forth, too.

Q. Will you speak louder, Mr. Woolley?

A. I say, that was quite a surprise to me because my truck went back and forth to the job, too,

(Testimony of E. B. Woolley.)

and I hauled some stuff for the Radkovich Company, and I had no idea they were going to charge me for this.

Q. Did anyone from Radkovich Company tell you they were going to charge you freight on anything they sent up there? A. No, sir. [217]

The Court: What did you say about those wire guards? I did not quite understand that. They were charged to you?

The Witness: Yes, sir.

The Court: And you say they were part of the fixtures?

The Witness: They were a part of the fixtures; yes, sir.

The Court: What are wire guards?

The Witness: Well, it is a sort of a cover.

The Court: An arrangement they made?

The Witness: It is just two porcelain sockets that screw to the wall, and then you put these lamp guards over to keep them from breaking.

The Court: They are wire guards; they are frames?

The Witness: Yes; they are a framework of wire that clamps right around the lamp globe itself.

The Court: They were a part of the fixtures, specified in the fixtures?

The Witness: Yes; they were specified as such.

The Court: In your specifications?

The Witness: Oh, no; not in the specifications. I don't know who devised it. There was nothing ever

(Testimony of E. B. Woolley.)

found to say what the fixtures should be.

Q. (By Mr. Benedict): You would have to have a fixture before you could use a wire guard, would you not?

A. Oh, yes, sir. I don't know who made up the the fixture. It was somebody made the fixture up and the Radkovich Company [218] bought it, but I don't know who made it up. It probably was at the suggestion of the army engineer.

Q. Was there anything suggested on any of the plans or in the specifications that have been introduced into evidence that called for a wire guard? A. No, sir.

Q. I show you another back charge dated the same date: "Work at Muroc performed by Drury Electric Co.," a total of \$166.66 including overhead of 10 per cent. Do you know what that refers to?

A. Well, I believe that Radkovich Company hired Drury Electric Company at the time I was off the job, but they didn't do any work on the job. My material was locked the full time I was off the job and there was nothing done on the job at all. My men never left the job.

Q. Did you know that when you came back on the job, that there had been nothing further done from the time you pulled off until the time you returned? A. That is right.

Q. I show you another back charge dated November 5, 1948, which is apparently a combination of the other. It speaks of "Subsistence 4 days @ \$7.00" and "Drury Electric Company", and that

(Testimony of E. B. Woolley.)

is a total of \$333.11. Does that refer to the subsistence of the men on the Drury Electric Company payroll? A. That is right. [219]

Q. Here is another back charge of November 5, 1948 for "2—1 light brackets for bathrooms (complete)", with tax, in the sum of \$4.30. What are light brackets?

A. They are brackets that go on a wall.

Q. Are they designated as "fixtures"; is that the common term for them?

A. They are fixtures; yes, sir.

Q. Another back charge of November 5, 1948 for "Halls & Bedrooms—25—glass shades"; "Front and rear porches V. P. globes".

A. That is vapor-proof.

Q. Vapor-proof globes. Those are electric light globes, are they? A. No; they are fixtures.

Q. And "kitchen ceiling 5-globes." Can you state whether all those items refer to fixtures or not?

A. They are all fixtures; that is right.

Q. Another back charge dated the same date for "25-glass shades" and "10-3x5 V.P. globes", etc., total of \$31.26. Can you state whether or not those all refer to fixtures?

A. They all are fixtures.

Q. I show you back charge dated November 4, 1948, consisting of several items, and also the page 2 of the same date, which is for a total of \$62.52. Are all those fixture [220] items?

A. They are all fixture items.

(Testimony of E. B. Woolley.)

Q. Another one dated November 5, 1948 for \$6.39. Can you state whether or not those are fixture items? A. They are all fixture items.

Q. Another one the same date for \$7.65. Is that a fixture item? A. That is.

The Court: Are you conceding these items or any of them as you go along?

Mr. Benedict: I have not come to those. As we go along I was going to mention it.

The Court: These are not conceded, is that it?

Mr. Benedict: That is right; those are not conceded. I will so state; in fact, we will initial the ones we concede when he comes to them.

Q. I show you another one dated November 4, 1948, consisting of several items for a total of \$3,124, and ask you whether or not those all relate to fixtures? A. They are all fixtures.

Q. I show you another one dated October 20, 1948, for \$45.98. That is one that you concede, is it not? A. That is right.

Mr. Benedict: With the court's permission, I will just write "okay" in the lower right-hand corner, which will make [221] it easy to determine that.

Q. Here is another one, dated October 19, 1948, for \$192.22. That is also conceded, is it not?

A. That is right.

Q. I will okay that one. Another one dated October 19, 1948, for \$97.70. That is also conceded?

A. That is right.

Q. I show you one dated October 20, 1948, in

(Testimony of E. B. Woolley.)

the total sum of \$208.30. Are all those items conceded?

A. Well, not these push buttons. That has to do with the chimes.

Q. And that is an item of "600 Edwards push buttons" at \$31.60?

A. I believe it is an item of 200.

A. Oh, is it 200? But the amount is \$31.60?

A. That is right.

Mr. Benedict: I will simply just put down "okay less 31.60 push buttons."

I show you one dated November 1, 1948, for \$51.22. Is that one conceded? What does that relate to, anyway?

A. No. That has to do with the fixtures hooking up those entry hall fixtures.

Q. That relates to a fixture item, then?

A. That is right.

Q. I show you one dated October 19, 1948, for \$176.78. [222]

A. I do not concede that.

Q. Does that relate to fixtures, too?

A. That is the globes for the fixtures.

Q. That is the globes, all right. Another one dated October 19, 1948, for \$182.08. Does that relate to fixture items, too? I am sorry, that is simply a continuation of the other one, isn't it?

A. That is right.

Q. That is page 2 of it; so the total item, then, is \$182.08. Then one dated November 1, 1948, for \$101.38. Does that relate to fixture items?

(Testimony of E. B. Woolley.)

A. No; it don't. I concede that.

Q. You concede that one. Another one dated October 19, 1948, for \$160.68. That one is also conceded, is it not? A. That is right.

Q. I show you another one dated October 19, 1948, for \$826.15; and that one is likewise conceded, is it not? A. That is right.

Q. One dated October 20, 1948, for \$43.91. What does that relate to?

A. That is fixture material.

Q. So that one is not conceded?

A. No.

Q. The next one is January 31, 1949, for \$376.69, and that relates to chimes. [223]

A. I do not concede that.

Q. The next one is January 31, 1949, consisting of three pages, a total of \$612.72, and you concede that? A. That is right.

Q. The last one does not seem to have a date. It is simply "15% Overhead on \$6,867.37 back charges \$1,030.11." Do you know what that item relates to? Can you tell us that?

A. Well, that is on the fixtures, and I sure don't concede it.

Q. When you started on the job, Mr. Woolley, and before you were able to start work with your men, did you have any conversations with Mr. Radkovich relative to taking your men off the job until they could do some work? A. I did.

Q. And when was the first such conversation that you had with him?

(Testimony of E. B. Woolley.)

A. After I had had the men on the job for about 10 days I found out that they couldn't do a thing for me, I was trying to get an approximate date from Mr. Radkovich and his superintendent about when they expected to start. And they were having trouble at that time with the aggregate and also with getting their forms over on the job site from the railroad siding. And I told them I could get the men back there fairly fast and until they actually had the material and the forms there, I would like to pull my men off the job, and if they could give me a week's notice, I could get the men back [224] any time they had the material there. And he said, "No;" they were going to start the following Wednesday, I believe it was; they were going to have everything set up and ready to go. Of course, I had been hearing that for quite a while, for 10 days, and I told him that—well, I thought I would pull them off, anyway, and just let him give me a notice when he wanted me back. And he said I had better not do that, and he threatened to back charge me \$500 a day for every day I held them off, if I did pull my men off there. So \$500 a day looked awful big at that time. Everything was going out and nothing coming in. So I just decided I would leave them there.

Q. There was an occasion when you left the job, was there not, Mr. Woolley?

A. Yes, sir.

Q. I show you a letter of mine dated June 4, 1948, directed to Radkovich, and ask you if that

(Testimony of E. B. Woolley.)

was written under your direction and authority?

A. It was.

Mr. Benedict: If I may, if the court please, I would like to read this in order to keep the testimony in orderly form.

“I am writing you on behalf of and as the attorney for E. B. Woolley. Your repeated failures and refusals to comply with your obligations under [225] Sub-Contract Re War Department Construction Contract No. W-04-353-eng-2050 between you as contractor and my client as sub-contractor has made it impossible for my client to carry on further and he must now stand on his legal rights. You are, therefore, advised that on Monday, June 7, 1948, he is removing his men and equipment from the job and holds you responsible for all damages sustained by him.

“Furthermore, please be advised that the electrical material remaining on the job site is the property of E. B. Woolley; that it will be padlocked; and that if said material is moved or disturbed in any way, my client will immediately bring civil action against such trespassers.”

The Court: The date of that letter?

Mr. Benedict: June 4, 1948.

The Court: Exhibit what?

Mr. Benedict: That is part of Woolley's No. 10.

Q. Mr. Woolley, did you or not on June 7, 1948 remove your men from the job? A. I did.

Q. And prior to the time you removed your men from the job had you had any conference with Mr.

(Testimony of E. B. Woolley.)

Radkovich relative to your taking that step? [226]

A. I did.

Q. Do you recall about when that was in reference to the date of this letter of June 4, 1948?

A. Around June 1st I would say.

Q. Do you remember where that conference occurred?

A. Yes; it was in Mr. Decker's office.

Q. That is Mr. Decker that is in the courtroom now? A. That is right.

Q. Do you recall who all were present?

A. Yes. Mr. Decker was present, Mr. Radkovich was present, Mr. Bray from the surety company was present, Mr. Radkovich's attorney—I don't recall his name; I think it was Shafer—was present, Mr. Benedict was present, the man that wrote my bonds—I don't recall the name—Paul Doring, he was present, and that is about all I can remember.

Q. Do you remember what was said at that time relative to your pulling off the job and by whom?

A. Well, I don't recall by whom it was said, but it was merely supplying of the electrical fixtures and the chimes and the things we do have in dispute here.

Q. At that time did Mr. Radkovich make any statement as to whether or not he still expected you to supply the fixtures?

A. I believe he said I was still expected to supply [227] the fixtures.

Q. Was anything said regarding the fact that

(Testimony of E. B. Woolley.)

the job had gone past the time for completion?

A. Yes. I brought that part up, that it had gone past date of completion and was going very, very slow, and that I was being delayed and the job was just costing me more money than I could handle for that reason.

Q. Do you remember whether or not Mr. Radkovich said anything about his expecting you to continue on with the work until it was finished?

A. I believe he did. I believe he said that under my contract I was supposed to go ahead no matter how long it took.

Q. Were you having trouble at that time or not in doing your work on the job site?

A. Yes. They were not supplying me with enough work. I had the job over-man-powered for that reason.

Q. Can you tell us, Mr. Woolley, whether or not you would have been able to have completed this job by April 15, 1948 had Radkovich performed his work according to schedule?

A. That is one thing I am positive of. I know I could have, because we were always on top of them, and I done all the pilot models down here in Los Angeles at his yard. When we had enough forms and they were given to us at the proper times, we jumped right on them and wired them. There was [228] nothing that would have held me up from completing on the completion date.

Q. Can you just describe briefly what the steps

(Testimony of E. B. Woolley.)

were in reference to your wiring one of these houses?

A. Well, the first step was, I screwed the electrical boxes to the form, then I run the steel tube from box to box, from switch to switch, and light outlet to light outlet, etc.

Q. Was that in the form before it was poured?

A. Well, it was stated that they were pouring them in series. That is not right at all. They was poured as a complete unit. There was an inner form and outer form. I put this electrical material on the inner form. After I was through installing the electrical tubing in the boxes, then the steel men went on and they put their steel on top of my boxes, and then they put the outer form around, and then they used a hydromatic gun, which was a very large nozzle that poured concrete over the complete building, and coated it up between the inner form and the outer form, and poured the roof and the walls and everything at one set. Then that was allowed to set for a length of time, until it set up, then they pulled the outer form and they pulled the building off of this stationary form, and then before I could get back on that stationary form again to redo the work, they had scraped it and greased it, and that was always delay, because they never had enough units there. We were always waiting to start [229] our work. I always had men standing around waiting to have men go to work on the buildings that were not scraped or were not greased before we could get to them.

(Testimony of E. B. Woolley.)

Q. If Mr. Radkovich's operations had not delayed you, you state that you could have finished by April 15, 1948. Could you have done so or not, without the addition of more men to your payroll during the period from August 28, 1947 to April 15, 1948?

A. I could have.

Q. As a part of defendant Woolley's No. 10 in evidence, I also show you a letter on your letterhead to Radkovich dated June 12, 1948. Did you send that letter about the date it bears?

A. I did.

Mr. Benedict: May I read this letter, if the court please?

"This is to advise you that I shall resume work under Sub-Contract Re War Department Construction Contract No. W-04-353-eng-2050, between you as contractor and myself as sub-contractor, on or before the commencement of the work day on Monday, June 14th, 1948.

"Such resumption of work by me shall be without prejudice to any rights or remedies which I may now have against you in connection with, arising out of [230] or under said sub-contract, and, without affecting the generality of the foregoing, particularly those matters referred to in the letters of my attorney, Frank M. Benedict, to you dated April 29, 1948 and May 8, 1948, and shall for no purpose be deemed, considered or construed as a waiver upon my part of any of said rights or remedies.

"You are hereby notified that I shall hold you

(Testimony of E. B. Woolley.)

liable for any and all damages and loss resulting to me in the future from your failure to proceed with reasonable diligence with other work on the job."

The Court: What exhibit is that?

Mr. Benedict: That is one of the letters in Woolley's Exhibit 10.

Q. Mr. Woolley, did you resume work?

A. I did.

Q. And do you know the date that you resumed work?

A. On the 10th, like the letter states.

Q. Well, the letter states the 14th.

A. The 14th, then; I went back on that date.

Q. And that was when you started back again?

A. That is right.

Q. From that time on, will you state whether or not you continued with the job until its completion? A. I did. [231]

Q. Mr. Woolley, when you returned on the job on June 14, 1948, having been away for a week, had there been any time lost in the operation due to your having been away during that period?

A. No, sir.

Mr. Benedict: I believe that is all, your Honor.

The Court: What do you mean by no time lost?

Mr. Benedict: My question, perhaps, was ambiguous. I can see that. Perhaps I had better reframe it.

Q. During the time that you were gone during that week was Mr. Radkovich delayed at all in the

(Testimony of E. B. Woolley.)

performance of the over-all contract?

A. No, sir. That was one of the reasons we pulled off, because there was actually nothing for us to do. They were in the process of hooking the two buildings together, Guniting them together, and there was nothing I could do until they were Gunited. So, to the best of my knowledge, I know they were not delayed.

Mr. Benedict: I believe that is all.

Mr. McCall: May I ask if counsel found and brought into court the estimates furnished to the general contractor by Mr. Woolley?

Mr. McPharlin: No; I did not, Mr. McCall, but you can use those copies that you have.

Mr. McCall: I show you these again, and there are some [232] pencil notations on one or two of them. Would you like to rub that out?

Mr. McPharlin: Oh, I think they should be rubbed off, whatever they are.

Mr. McCall: Will you strike out, then, the part that you object to, that is, the pencil notations?

Mr. McPharlin: Oh, I do not object to anything, Mr. McCall.

Mr. McCall: Thank you.

Direct Examination

Q. (By Mr. McCall): Mr. Woolley, I hand you what purports to be seven estimate statements on your stationery in connection with this job, and ask you if those seven statements were furnished to the Radkovich Company? A. They were.

(Testimony of E. B. Woolley.)

Mr. McCall: May I introduce these seven statements or estimates as the Glens Falls' next exhibit? And should I identify each one or not?

The Court: Oh, they may be one exhibit. You may mark the papers if you wish.

The Clerk: Admitted into evidence, your Honor?

The Court: Yes.

The Clerk: These documents will be Glens Falls Indemnity Company Exhibit No. 13 into evidence.

The Court: Now, what estimates are these?

Mr. McCall: The ones furnished by Mr. Woolley, the subcontractor, to the general contractor or prime contractor.

The Court: At what time?

Mr. McCall: During the progress of the job. It was on these estimates the payments were based.

The Court: Oh, yes, you mean payment estimates?

Mr. McCall: Yes.

Q. I show you these estimates and ask you as to the first one there, dated September 25th, 1947. Is that the one on which you received check No. 1166 October 22, 1947 for \$5,000?

A. That is right.

Q. And the estimate is in the amount of \$9,885.37?

A. That is correct.

The Court: Do you want to mark that "page 1"?

Mr. McCall: It is page—

The Court: Or the date; give us the date.

Mr. McCall: September 25, 1947, but there is one of these, your Honor, contains three pages and

(Testimony of E. B. Woolley.)

I have marked them as to estimates.

The Court: All right.

Mr. McCall: September the 25th, 1947 is the date of this first one.

Q. And that was the same date, October the 22nd, 1947 [234] that Mr. Radkovich testified he gave you an additional \$4,000 as a loan?

A. That is right.

Q. And did you pay him \$500 for that loan?

A. That is right.

Q. I show you estimate No. 2, dated November the 1st, 1947, in the sum of \$16,551.09, and ask you if that is the one on which you received, November the 25th, 1947, a payment from Mr. Radkovich in check No. 1448 in the sum of \$15,000?

A. That is correct.

Q. And this No. 2 estimate contains three pages?

A. That is right.

Q. And now I show you there estimate No. 3, dated November the 24th, 1947, which is in the sum of \$9,165, and ask you if that is the one on which you received the Radkovich Company check December the 30th, 1947 in the sum of \$3,000?

A. That is correct.

Q. And the Radkovich check was No. 1694?

A. That is right.

Q. I show you estimate No. 4, dated January the 12th, 1948, which claims total due \$6,042.97, and I will ask you if that is the one on which you received payment in check 1961, January the 28th, 1948, in the sum of \$3,914.27?

(Testimony of E. B. Woolley.)

A. That is right.

Q. Then I call your attention to No. 5 estimate, dated [235] February the 12th, 1948, in the total sum of \$22,798.50, and ask you if you received anything on that estimate?

A. I believe I received \$18,000 on it.

Q. Is that the one, then, you received by check 2354, March the 13th, 1948, in the sum of \$18,000?

A. That is right.

Q. You heard Engineer Ferguson testify in connection with this one the other day, yesterday?

A. I did.

Q. And can you tell the court how much he allowed you on this when you went to him?

A. He allowed me the full estimate.

Q. What is that? A. \$22,798.50.

Q. Then I will call your attention to estimate No. 6, dated March the 10th, 1948, in the total sum of \$24,799.58, and ask you if you received anything on this estimate? A. No, sir; I did not.

Q. Did you take this particular estimate to Engineer Ferguson? A. I did.

Q. How much did he allow on this estimate?

A. As I remember it, he allowed the whole thing. He stated yesterday he only allowed me \$21,999.58, but this other \$2,800 for work we done, I am sure he allowed me that at the [236] same time. But in any event, he said he allowed me \$21,999.58.

Q. But you got no payment on that estimate?

A. No.

(Testimony of E. B. Woolley.)

Q. Mr. Woolley, let us turn back here to estimate No. 3. It says in part: "Rough installations for 23½ houses @ \$390.00 per house." Did you have a conversation with Mr. Radkovich regarding the change in the method of payment under your subcontract? A. I did.

Q. And where did that conversation take place?

A. In his office.

Q. And was that prior to this No. 3 estimate dated November the 24th, 1947?

A. Yes; it was right after I received No. 2 estimate for \$15,000.

Q. And who was present?

A. Radkovich and Flobeck—I am sure Flobeck was there—and I was talking to Radkovich.

Q. What was said about changing the method of payment under your subcontract?

A. Well, Bill told me that since the rough-in material was on the job and they had paid for it, that he wanted to pay me \$390 a house as labor only, and that he would pay me for any other material in full that I sent up there, but he would pay me \$390 a house labor as they were roughed in.

Q. Can you state to the court, then, the difference between the amount here of \$9,165 and the amount which Mr. Radkovich says he paid you, \$3,000?

A. Well, when I took this estimate over there he said that he could not pay me \$390 a house; that was too much for labor. And he wanted me to take \$200 a house. So we argued back and forth and I

(Testimony of E. B. Woolley.)

finally agreed to take \$200 a house, but I did not even get \$200 a house. He told me he was in financial trouble and if I could take \$3,000, he would make it up on the next estimate.

Q. I call your attention to estimate No. 4, dated January the 12th, 1948, which states in part: "Rough installations for 57 units @ \$200.00 \$11,400.00; Previously billed 35 units \$7,000.00", which shows a total due of \$6,042.97. Can you state why there was a difference between that amount and the amount which Mr. Radkovich claims he paid you, \$3,914.27?

A. I recall that one very plainly. When I went over to his office to get the check, why, he told me that he was still having financial difficulty, and he wanted to know what was the least I could get by with; and I called my office and the bookkeeper figured up just exactly what I had to have for the payroll and what I had to pay out, and that is why it is such an odd figure of \$3,914.27.

Q. That is what you actually had to pay out?

A. That is what I actually had to pay out to keep going; and so he gave me that check and said as soon as he got these payments in from this job and another one that the Government was holding up money, he would make up the difference to me.

The Court: Does that appear on this sheet? What sheet is that, Exhibit what?

Mr. McCall: Your Honor, I have marked it for convenience there; (Indicating to court) fourth estimate, I believe.

(Testimony of E. B. Woolley.)

The Court: Yes.

Q. (By Mr. McCall): No. 5 estimate, dated February 12th, 1948, shows "Rough installations for 77 units @ \$200.00; Previously billed 57 units", and this one claims at \$200, total \$22,798.50.

A. I beg your pardon. It is \$4,000 for the rough, and this is material delivered to the job.

Q. That is \$4,000 at \$200 per unit?

A. That is right. That was the agreement with him, he would pay me \$200 as labor only and any material that I sent up there to the job would be added to it, and they would pay me 100 per cent for the material.

Q. That was the agreement you say you had with Mr. Radkovich regarding the change in the method of payment? A. That is right.

Q. It was after the second estimate?

A. That is right. [239]

Q. Is this the one on which you received Radkovich Company check No. 2354, March the 13th, 1948, for \$18,000? A. That is right.

Q. Do you know the date that you had this conversation with Mr. Radkovich at which time the method of payment was changed?

A. It was either at the time that I received the second estimate or the day or two after that.

Q. Well, with reference to the month of November or October could you state about when it was? A. I believe it was in October.

Q. You heard Engineer Ferguson testify yesterday with reference to the time that you called

(Testimony of E. B. Woolley.)

on him in an airplane trip to find out how much he had allowed on one of the payments?

A. Yes, sir.

Q. And you heard Mr. Radkovich testify briefly on the same point? A. Yes, sir.

Q. Will you state to the court what estimate, if you are able to, that you made this airplane trip to see the engineer about and why?

A. Yes. It was on this estimate that I received \$18,000. I had \$22,798.50 due, and I come from the job site to Radkovich's office and was trying to pick up a check for [240] this amount. And he told me that the Government didn't allow it to me; that they only allowed me \$20,000, I believe he said. I told him I just talked to Ferguson and he said that he had allowed me the full amount. And he said he was wrong about that, he must have thought something else. He said, "However, if you will go up there to Ferguson right now and have him call me or get a note from him that he did allow you that much, why, I will give you a check for it."

So I went over, rented an airplane and flew up to Muroc and found Ferguson and got a note from him stating that he had allowed me the \$22,798.50, and I brought it back to Radkovich's office. And he said he was a liar and he didn't allow me that, and he just crumpled up the thing and threw it in his wastebasket, and said that he would give me a check for \$18,000. And I was broke at the time and owed a lot of obligations, so I took the check for \$18,000.

(Testimony of E. B. Woolley.)

Mr. McCall: That is all, thank you.

Mr. Benedict: If the court please, before Mr. McPharlin's cross examination, there were two or three small items I overlooked. May I ask permission to reopen and go into those?

The Court: Yes.

Mr. Benedict: Thank you. I understand Mr. McPharlin will stipulate with me that Mr. Woolley at all times during the matters here involved was a duly licensed electrical contractor? [241]

Mr. McPharlin: Yes; I will so stipulate.

Further Direct Examination

Q. (By Mr. Benedict): Mr. Woolley, do you have a memorandum there of the items that go to make up your claim for extras? A. I do.

Q. I show you, first, Defendant's No. 6 in evidence, which was, I believe, as you testified, the first working drawing that you were supplied with, is that right?

A. That is right. I helped work this one out.

Q. Will you state whether or not that drawing calls for the supplying by you of chime circuits or chimes? A. No, sir; it does not.

Q. How about phone circuits?

A. No, sir; it does not.

Q. And how about closet lights?

A. No, sir; it does not.

Q. And in connection with the specifications that you had, do they make any provision for the furnishing of those items?

(Testimony of E. B. Woolley.)

A. They say where type numbers are indicated on the plan for the fixtures, and it says where circuits are shown for the chime circuits. There is nothing in the specifications about a phone system whatsoever.

Q. There is nothing in the drawing that indicates any [242] chime circuit at all or chimes, is that right? A. No, sir.

Q. Or any of these other items?

A. No, sir.

Q. Now, I show you Woolley's No. 11, which I believe you testified was the revised plan that was given you some time in September, the latter part of September? A. That is right.

Q. Does that provide for the furnishing of electrical fixtures?

A. Only with a note. It says: "Electrical fixtures in accordance with list to be submitted for approval."

Q. Does it provide for a chime circuit?

A. It does.

Q. Does it provide for a phone circuit?

A. It does.

Q. And does it provide for a closet light?

A. It does; and also for two three-way switches.

Q. Were those two three-way switches provided on the previous plan that I have just shown you or not?

A. No. They had one single-fold switch to control these two lights now that make it so as to control from the kitchen door to the front door.

(Testimony of E. B. Woolley.)

Q. Will you take your memorandum of these items? Can you tell me, first, the cost to you, or, rather, your [243] claim for extras for hanging these fixtures?

A. Yes; it was 1200 man-hours at \$4.00 an hour, \$4,800 labor only.

Q. Is that all that your claim for that consists of, is just the \$4,800?

A. That is right.

Q. In reference to the chime circuits, do you have a claim for that? A. Yes, sir.

Q. And how much is that?

A. I have labor at \$400 and material at \$1,711.80.

Q. What is the total on it?

A. It would be \$2,111.80.

Q. Now, do you have an item there for phone circuits? A. I do.

Q. And what is that amount?

A. 33 $\frac{1}{3}$ man-hours at \$4.00, \$133.33 labor only.

Mr. Benedict: I believe Mr. McPharlin stated yesterday that that item is conceded, or am I mistaken on that?

Mr. McPharlin: No; that is correct. There is no dispute over that item.

Q. (By Mr. Benedict): In reference to the closet lights, do you have any additional claim in that respect?

A. I do. There is 200 man-hours at \$4.00 an hour, \$800 labor, and \$432.54 for material. [244]

Q. And what would the total on that item be, then? A. \$1,232.54.

(Testimony of E. B. Woolley.)

Q. Is there any other claim for extras included in the claim set forth in your complaint of \$8,385.53 or does that total that sum?

A. No; I have a claim for the two small buildings that were lost. They were lost under no fault of mine.

Q. What items did you lose in connection with that?

A. The complete rough-in for the two small kitchen units; that is two separate buildings and they are the kitchens of these buildings that are poured separate, and then they are joined and Gunited together.

Q. And that was the occurrence that I believe Mr. Ferguson, and perhaps Mr. Radkovich has testified to, when two of the buildings cracked and collapsed, is that right?

A. That is right.

Q. What is your claim in that respect?

A. \$107.86.

Q. Have you testified now to all of the items that go to make up your claim for extras of \$8,385.53?

A. I have.

The Court: Is there an exhibit showing all of these extras?

Mr. Benedict: Yes. I think that we would like to offer this into evidence, which does give our capitulation on it. [245] I believe you have a copy on that, have you not? Woolley would like to offer this into evidence as his next exhibit in order.

The Clerk: Admitted, your Honor?

The Court: It will be received.

(Testimony of E. B. Woolley.)

The Clerk: That will be E. B. Woolley's Exhibit No. 14 into evidence.

Mr. Benedict: Thank you for the indulgence, if the court please. That is all.

The Court: These exhibits show the overhead and the labor, material and all those?

Mr. Benedict: It shows everything that he testified to there, your Honor.

The Court: He did not itemize.

The Witness: It is itemized, your Honor.

Mr. Benedict: It is itemized on that statement; yes, your Honor.

The Court: Is it?

The Witness: Yes, your Honor.

Mr. McPharlin: Is there a morning recess, your Honor?

The Court: Yes; we will take a five-minute recess.

(Short recess.)

Cross Examination

Q. (By Mr. McPharlin): Mr. Woolley, I believe you have previously testified that when you received the balance for the electrical work [246] you also received the set of specifications which are in evidence? A. I did.

Q. And you read those specifications, didn't you?

A. I did.

Q. I will hand you the contract and specifications, Radkovich's Exhibit B, and direct your attention to certain parts of that. On page 15-2, under

(Testimony of E. B. Woolley.)

sub-paragraph b. At the bottom of the page, it states, among other things, that "the Contractor shall submit to the Contracting Officer for approval a complete list, in triplicate, of materials, fixtures, and equipment to be incorporated in the work."

You read that, didn't you, Mr. Woolley?

A. I did.

Q. On page 15-3, at the top of the page, sub-paragraph c. It states, in part:

"If the Contractor fails to submit for approval within the specified time, a list of materials, fixtures, and equipment in accordance with the preceding paragraph, the Contracting Officer will select a complete line of materials, fixtures, and equipment. The selection made by the Contracting Officer shall be final and binding and the items shall be furnished by the Contractor without change in contract price or time of completion."

You also read that, didn't you, Mr. Woolley?

A. I did, and I submitted a list of everything I found I was to furnish.

Q. Did you submit a list of fixtures?

A. No, sir; I didn't feel I was to furnish them.

The Court: Which one of those has to do with fixtures, the first one that you read?

Mr. McPharlin: There are several references to paragraphs, yes. The first paragraph I read was on page 15-2.

The Court: All right.

Mr. McPharlin: The second paragraph I referred to was 15-3.

(Testimony of E. B. Woolley.)

Q. On page 15-8, under paragraph numbered 15-19 "Fixtures", it states:

"Where type numbers are indicated on the drawings, the Contractor shall furnish and install all lighting fixtures in accordance with the applicable details." You also read that, did you?

A. I did. I read the one before it, too.

Q. I will hand you the drawings marked Radkovich's Exhibit No. H, of which it has been previously testified that you had a true copy which was delivered to you with the specifications of the electrical drawings as shown on this page, is that correct?

A. That is correct.

Q. I direct your attention to page 6 of these drawings [248] and, on the left-hand side, it has a column of symbols and words, isn't that true?

A. That is true.

Q. The first one shown on it has a symbol of a circle and next to it, it states "ceiling outlet", is that correct?

A. That is correct.

Q. On the drawing of the house it does show a ceiling outlet on the kitchen, doesn't it?

A. That is true.

Q. Also, it has a symbol which indicates on the plans as a fluorescent light, isn't that correct?

A. Yes; that is where they are going to hang a fluorescent light.

Q. And it shows on the plans, in the closet, two fluorescent lights?

A. It shows outlets for them; yes, sir.

(Testimony of E. B. Woolley.)

Q. It does not say anything about "outlets", does it?

A. Yes, sir; that is what it means. This explains the symbol so you will know what is there. In other words, various contractors or architects use different symbols, and this is explaining the symbols that is used on that plan.

Q. These refer to fixtures, don't they?

A. No, sir.

Q. Is a wall bracket a fixture?

A. A wall bracket is a fixture; yes, sir. [249]

Q. On the plans doesn't it show a symbol here consisting of a circle and a cross next it which states "wall bracket"; isn't that correct?

A. That means an outlet for a wall bracket; yes, sir.

Q. You have just stated that a wall bracket is a fixture, haven't you? A. That is right.

Q. And this shows a symbol and it states "wall bracket", is that correct? A. That is right.

Q. In the rooms themselves it does show wall brackets, doesn't it?

A. That is right. And here it shows "motor", right here, symbol for a motor, but I did not install no motor. I didn't have to.

Q. We are referring only to fixtures. I have read you the paragraphs in the plans about fixtures, Mr. Woolley. Those plans do show and indicate that wall brackets are to be placed at certain places in the building, don't they?

A. They do.

(Testimony of E. B. Woolley.)

Q. A wall bracket is a fixture, isn't it?

A. It is.

Q. A fluorescent light is a fixture, isn't it?

A. It is.

Q. Now, in making up your bid didn't you consider those [250] fluorescent fixtures and those wall brackets you have just referred to?

A. No, sir; I did not.

Q. And why didn't you?

A. As I stated before, that generally the general contractor moves in on the electrical contractor and furnishes his own fixtures. I presumed that was the case here.

Q. In other words, you just presumed that the contractor was going to furnish the electrical fixtures? A. That is right.

The Court: How did you presume that? Indicate precisely in the specifications how you presumed that.

A. For the simple reason, in the specifications it has "pilot light", it has "motor", it has "motor disconnect means" and lots of things in there that I was not supposed to furnish.

The Court: Was that in the specifications that you bid on?

The Witness: That is right.

The Court: All those matters and things?

The Witness: Absolutely, yes, sir. They are not on the plan.

The Court: Your interpretation is or, rather, your thought is that the fact they were mentioned

(Testimony of E. B. Woolley.)

on the plans does not necessarily indicate that you were to furnish those?

The Witness: No; absolutely not. [251]

The Court: Where is there an indication that they are not to be furnished by you? Is there any indication of that kind?

The Witness: It says "Only where indicated on the plans," and they were not indicated on the plans. The type of fixture I was to furnish of a chime outlet is not on the plan. There is one motor on the plan and it is covered in the specification. It says it will be furnished by other contractor. And also in the specifications it says "pilot lights and switches where indicated on the plan," and there is none indicated on the plan. There is never any basis from any plan that they had that shows what type of fixture or what amount or what kind of a fixture they want in there.

The Court: Where specifications recite that the contractor furnishes fixtures, or whatever he is to furnish, does that indicate to you that you are to, or that some other situation exists?

The Witness: Well, as the specifications say "where indicated on the plan by type numbers," I was to furnish the fixtures; but it never was indicated on any plans.

The Court: There are no type numbers on any plans?

The Witness: No, sir; absolutely on no plans that they have.

The Court: Proceed.

(Testimony of E. B. Woolley.)

Q. (By Mr. McPharlin): Did you consider there was any [252] discrepancy between those plans and specifications?

A. I know there was.

Q. I will hand you Woolley's Exhibit 1; this is your own letter in evidence?

A. Yes, sir.

Q. It states, paragraph 5.

“Check all drawings for errors and discrepancies and report same to this office (Attention J. D. Barrington) so that adjustments can be made with no loss of time.”

This was addressed to you and dated August 8, 1947.

A. And I did go see Barrington.

Q. When?

A. Shortly thereafter.

Q. Haven't you previously testified that you brought up nothing on this until you received a copy of the Government plans that you stated made changes?

A. Well, that is true, but I did go to him to see about the fixtures.

Q. When?

A. Shortly after I received that letter. Barrington's office was different from Radkovich's office, and I went to see Barrington about the fixtures.

Q. Did you write to him?

A. No. No; I went to see him in person. [253]

Q. You know Barrington is not here now, don't you?

A. Yes; I know that.

Q. Where is he supposed to be?

A. I tried to locate him. My attorney tried to locate him but we could not.

(Testimony of E. B. Woolley.)

Q. You never took it up with Radkovich?

A. No. Barrington was handling all that for Radkovich at that time.

Q. You never took it up with Mr. Parks in Radkovich's office?

A. Yes; I took it up with Parks, first, and he referred me to Barrington. That was the way I got to Barrington.

Q. You took up the matter of these fixtures with Parks, first, before you took it up with Barrington? A. I believe so; yes, sir.

Q. And when was that?

A. Well, I guess you are right. I guess it wasn't until this fixture deal come up.

Q. Did you think the Government was going to furnish the fixtures?

A. Well, I didn't know.

Q. I want to call your attention on the specifications to page S-1, to the last paragraph:

“Government-Furnished Material or Equipment. The Government will furnish to the Contractor as free issue [254] the following materials and equipment incorporated or installed in the work or used in its performance.” And then it goes down at the bottom and, for the items to be furnished, it states under “Items”—“Kitchen ranges, Refrigerators”, and that is all it states, isn't it?

A. That is right.

Q. You read that paragraph? A. I did.

Q. And you still thought the Government was going to furnish the electric light fixtures?

(Testimony of E. B. Woolley.)

A. No; I thought Radkovich was going to put them in.

Q. Oh, then you thought Radkovich was going to put them in? A. That is right.

Q. I would like to hand you your deposition.

Mr. Benedict, do you have the original deposition?

Mr. Benedict: I have the original that has been signed, but that has not been notarized, but I will stipulate it may be deemed to have been verified. There have been two slight changes made in it.

Mr. McPharlin: I will accept that stipulation that we may consider that it has been verified. It has been read by him?

Mr. Benedict: Yes; it has been read.

Q. (By Mr. McPharlin): I will refer you to the deposition [255] that I have just handed you. Do you recall sometime ago when your deposition was taken, when I questioned you and your attorney was present? A. Yes, sir.

Q. Now I call your attention to page 7 of that deposition and I will ask you to read, beginning at line 8, to the bottom of the page. Read that to yourself. Or beginning at line 3. I am sorry, Mr. Woolley. Now, I will read that to you and then ask you about it, Mr. Woolley.

“Q. Now, a wall bracket, isn’t that a fixture?

“A. Yes, it is a fixture.

“Q. And fluorescent is a fixture?

“A. That is right.

“Q. Then in making up your bid from this

(Testimony of E. B. Woolley.)

plan you did consider these fluorescent fixtures and these wall brackets referred to?

“A. I did not.

“Q. Why didn't you?

“A. There is no possible way to know what type of fixture it is, whether it was going to be a gold finish, a silver finish, whether it was going to be a two-light, four-light, or six-light fluorescent, or anything about the fixture.”

Did I ask you those questions and were those your answers, Mr. Woolley? [256]

A. That is right.

Q. Isn't it true that you did not figure those because you did not know whether it was going to be a gold finish fixture, silver finished fixtures, or what type of fixtures?

A. That is right; I didn't figure them because I didn't know anything about the fixtures.

Q. You knew Radkovich was not an electrical contractor, didn't you? A. I did.

Q. You were the only electrical contractor on this job, isn't that correct? A. I was.

Q. Mr. Woolley, another extra which you have claimed is on the chimes, the chime circuits. I want to direct your attention to page 15-8 of the specifications, paragraph numbered 15-20.

“Signaling System (For Quarters). The Contractor shall furnish and install a low-voltage signaling system consisting of push buttons and musical door chimes, as hereinafter described and where indicated on the drawings. The Contractor shall install

(Testimony of E. B. Woolley.)

dual-purpose, 2-toned, bar-type musical chimes. Tones shall be amplified by two short resonating tubes. Tone bars and operating mechanism for each set of chimes shall be completely concealed by an approved [257] ornamental housing. The signal for the rear entrance shall be distinct from that of the front entrance. Push buttons shall be of the flush type"—

and then it goes on giving further directions as to this type of signaling system. You read that paragraph in the specifications, but now you state that you did not include any chimes or chime circuit on your contract as you feel that you were not obligated to furnish them?

A. No, sir. I took that up with Bill Radkovich, himself, when I was figuring the job and he said, "If it is not in the plan, just forget it."

Q. When did you take that up with Radkovich?

A. The day after I took the plan to him the first time.

Q. What did you tell him? What was the conversation?

A. I told him in the specifications it called for a signal system and on the plans it didn't show any. He said, "That has been taken out. Just forget it."

Q. He said it had been taken out?

A. That is right; and it was taken out. There was nothing in the plan.

Q. Nothing at all? A. Nothing at all; no, sir.

Q. Did you hear the testimony of Mr. Ferguson, the resident engineer? A. I did. [258]

(Testimony of E. B. Woolley.)

Q. And he stated that the plans made reference to chime circuits? A. He did.

Q. And don't they? A. No, sir.

Q. Do you recall him pointing out down here to the chime circuit? A. I do.

Q. Wasn't what he said the truth?

A. Well, he probably thought it was the truth, but that is on a breaker panel. It has nothing to do with the wiring system at all. That is a load center.

Q. It shows the chimes circuit on the breaker panel?

A. It shows a breaker for a chime circuit.

Q. I see. And then you state that you took that up with Radkovich and he said it had been taken out of the plans, is that correct?

A. That is right.

Q. And that was before you put in your bid or afterwards? A. Before I put in my bid.

Q. Who else was present at the conversation?

A. I believe just Radkovich and myself.

Q. Where were you?

A. At his office. They were still wiring the pilot models there. [259]

The Court: How did that discussion arise or how did the question arise in your mind?

The Witness: Well, because I went and took the specifications and the plans and I marked the things that were not on the plans that were called for in the specifications.

The Court: Did you make a list of them?

(Testimony of E. B. Woolley.)

The Witness: Yes, sir. It is in my set of specifications.

The Court: That was before you signed your contract?

The Witness: Yes, sir.

Q. (By Mr. McPharlin): Did you furnish Radkovich with such a list?

The Court: I did not hear the question.

Q. (By Mr. McPharlin): Did you furnish Radkovich with such a list?

A. Not a written list, no, sir. I had the specifications right there and was showing him what I was talking about.

Q. Did you have fixtures on that, too?

A. I don't recall whether they were on there or not.

Q. Then it was not a list of everything that you did not consider was on the plans?

A. It might have been. If I can look at my specifications, I can tell you.

Q. You don't know without looking. Haven't you just previously told us that the first time that you ever brought up the question of the fixtures was sometime after your contract [260] was signed?

A. That is right.

Q. Is it now your testimony that before the contract was signed you took it up with Radkovich?

A. Not about the fixtures; no, sir. But there was other various things on there that it called for that

(Testimony of E. B. Woolley.)

were not on the plans that I took up with him.

Q. But you did not take up the question of fixtures with him? A. No, sir.

Q. When you first submitted your bid on this job how much was your bid?

A. Seventy five thousand. That was an oral bid.

Q. Did Radkovich accept it?

A. Yes. He called me the next day and accepted it.

Q. I notice that your subcontract is \$80,000. How does that happen?

A. Well, I refigured it and I found out that I was mistaken in thinking that the army was furnishing the heaters; that I was supposed to furnish the water heaters. And I went back over and told him I couldn't take the job because I had overlooked a big item there of the water heaters, and for that reason I couldn't take it at the figure of \$75,000. And he asked me what I could take it at and I called a local wholesale house for an approximate figure from them, and they [261] gave me a figure of \$6,100 for 100 water heaters. And I quoted that figure to him and he said he couldn't allow me that \$6,100; he would give me \$5,000, or he would give me \$80,000 and make it a round figure.

Q. And you gave him a quotation of \$61.00, or a total of \$6,100 for the water heaters?

A. That was a rough quotation. I just called one wholesale house. That is right.

Q. Then you state that in figuring this bid you had overlooked the water heaters, is that correct?

(Testimony of E. B. Woolley.)

A. That is right.

Q. And when you told Radkovich about it, he agreed that you could increase your bid or increase the contract price another \$5,000, is that correct? A. That is right.

Q. Did you tell him you had overlooked anything else? A. No, sir.

Q. You knew Radkovich was depending on you to do the electrical work on this job, didn't you?

A. That is right.

Q. You never asked him whether he was going to furnish the fixtures, did you? You never asked him?

A. Nothing until it come up about it; no, sir.

Q. On the phone circuits you have agreed to that labor charge of \$133.33. That was something that the signal corps [262] up on the Muroc base decided that they would like to have you put in, wasn't it?

A. I believe that is what it was.

Q. Yes. And they talked to both you and Radkovich about it, didn't they?

A. Well, I didn't know anything about it until I went up there, and Radkovich's man was going to do it himself and my superintendent or my foreman was squawking, because it didn't come under union—*it* mean it come under the union agreement, and they wouldn't allow them to do it. So then, Bill hired me to do it.

Q. Did you ever submit your shop drawings for the work that you were to do on the job?

A. I did.

(Testimony of E. B. Woolley.)

Q. When were those submitted?

A. About September the 22nd, 1947.

Q. Who did you furnish those to?

A. Radkovich's office and a copy to the electrical inspector.

Q. Are those the ones that you went over to the engineers' office with?

A. No, sir.

Q. Are your shop drawings in evidence here?

A. They are, sir.

Q. Which ones are they? [263]

A. They are the photostatic copies in the Army Engineers' files.

Q. Those were approved, were they?

A. No, sir; they were not.

Q. You knew that your shop drawings were required to be approved by the army before you went ahead with your work, isn't that correct?

A. Well, they were not turned down because they were not right. I don't believe they ever reached the army.

Q. Didn't you just say you got these from the army files?

A. That is right. But I don't believe they ever went in there for approval. It just showed location changes only. There were nothing changed on the plan. They were just location changes.

Q. You never did work under those because you never got an approval on them from the army?

A. That is right. I received an approved plan back from the army that had these extra things

(Testimony of E. B. Woolley.)

written in it, and that it what I went to see the army about.

Q. Now, Mr. Woolley, you have put in a claim which you have called "damages" for delay, for pay roll from August 28, 1947, to October 1, 1947, in the amount of \$1,149.22. Isn't it true that that consists of your total pay roll from the time you first went on the job, August 28th, up until October 1st?

A. That is true. [264]

Q. And isn't it also true that your men worked up there during that period on this job?

A. Well, that was nonproductive labor, except I said yesterday there could have been a week that they did prefab.

Q. There might have been a week?

A. There might have been a week; yes, sir.

Q. That they did do some work?

A. That they did do some work.

Q. And did the prefabbing?

A. Yes, sir; about a week.

Q. And for this type of construction prefabbing is the ordinary type of doing a job of this type?

A. After you have an approved plan; that is right.

Q. But you never got any plans there which were approved prior to October 1st, did you?

A. No, sir. No, sir.

Q. That \$1,149.22, then, is not all nonproductive work?

A. No. There could have been a week in there that they did some prefabricating.

(Testimony of E. B. Woolley.)

The Court: How much would that amount to?

The Witness: \$200. I paid them \$100 a week, each man. I had two men there.

Q. (By Mr. McPharlin): Mr. Woolley, on this job up in Muroc isn't it true that you did not personally superintend this work? [265]

A. Well, it was under my supervision. I was on the job every week. I wasn't there every day.

Q. You would be up there ordinarily once a week, wouldn't you?

A. That is right; yes, sir, or any time they called me for difficulties.

Q. You had a foreman or superintendent up there on the job?

A. I had a foreman up there; that is right.

Q. You have no personal knowledge yourself of having been up there on each one of these days and seeing how much each of these men did, do you?

A. Well, for the first—

Q. No. Can you answer that question, whether you were personally up there each day and saw what each of these men were doing?

A. At the start of the job I was there, quite naturally; yes, sir.

Q. Well, were you there all the time?

A. Not all the time; no, sir.

Q. On an average of once a week, wasn't it?

A. No; not at the start of the job. I was up there, I would say, three days out of the week.

Q. You would not be up there all day long; you just made trips up there and back, didn't you?

(Testimony of E. B. Woolley.)

A. I was up there all day long on various occasions, when we were going over the plans up there and giving directions to the men what they were to do.

Q. You had other jobs going in Los Angeles at that time? A. Absolutely; yes, sir.

Q. You were taking care of these other jobs, also, weren't you?

A. That is right. I had a foreman here, locally, too.

Q. For the period of April 15, 1948, to October 6, 1948, you have claimed damages for delay of \$15,027.30. Now, that consists of your total pay roll from April 15th to the end of the job, October 6th, is that correct? A. That is correct.

Q. And you are claiming that as your damages for delay in that period, is that correct?

A. That is right.

Q. Now, isn't it also true that you have claimed as an extra labor for installing the fixtures and chimes and the phone circuits, closet lights, etc., those extras for labor in the amount of \$6,149.33? You have claimed that as extra labor, haven't you, to which you are entitled? A. That is right.

Q. Now, isn't it true that those fixtures, the chime circuits and those closet lights, that that work was installed in that same period of April 15 to October 6, 1948? [267]

A. I believe that is right; yes, sir.

Q. Then you have duplicated that labor charge, haven't you? A. Yes; I guess so.

(Testimony of E. B. Woolley.)

Q. You heard your counsel stipulate to the propriety of the claim by Westinghouse of \$26,000 some dollars plus interest, and I believe you admit that you owe that money to Westinghouse, is that correct? A. I do.

Q. And that obligation to Westinghouse is for materials furnished on this job, is that true?

A. That is right.

Q. And those materials are not involved in any of these extras, are they? A. Yes; they are.

Q. There were no fixtures on the Westinghouse bill, were there?

A. No, sir; there were no fixtures.

Q. The chimes were not in there?

A. No, sir; but all the wiring for the chimes was in there.

Q. Wiring?

A. Wiring, steel tubing, boxes, and so forth.

Q. You had received, which I believe you agreed to, up to April you had received actual payments from the Radkovich [268] Company, which I believe you have admitted, of \$48,914.27; isn't that correct? A. That is correct.

Q. Out of that \$48,914.27 how much did you pay to Westinghouse who was furnishing your materials on this job?

A. \$9,800, a little over that, but that is about the total sum.

Q. Would it refresh your recollection if I stated the amount was only \$9,108?

A. That is probably correct.

(Testimony of E. B. Woolley.)

Q. And there was over \$40,000, in addition, that you had received but you had not paid anything to Westinghouse out of that other \$40,000?

A. That is right.

Q. Isn't it true that on those progress estimates that you received from October up through March, a large part or a substantial part of those progress estimates consisted of payments made to you on the basis of materials on the site?

A. On one occasion, yes, when I got the \$15,000.

Q. For example, the one on March, wasn't there around an eighteen or nineteen thousand dollar payment for materials on the site?

A. Yes. Yes; that is right.

Q. You did not make payment to the material supplier on that, did you? [269]

A. No, sir. I was way behind on my pay roll then.

Q. And at that time you had several other jobs going in Los Angeles, didn't you? A. Yes, sir.

Q. Now, I believe you have previously stated that you walked off this job and that you were off for about a week, is that correct?

A. That is correct.

Q. Isn't it true that the Gunitite man was working there at the time, Guniting these buildings?

A. I believe they were building forms before the Gunitite man.

Q. You were not up there that week, were you?

A. No, sir.

Q. You do not know just what actually was tak-

(Testimony of E. B. Woolley.)

ing place, of your own knowledge during that week, do you? A. No, sir; I do not.

The Court: How did you arrive at that \$15,000 item of damage for delay?

The Witness: That was the length of time that it took me to finish the job after the job was supposed to be finished. I was delayed by the prime contractor from finishing the job on April 15th, and it took that \$15,000 to go ahead and finish the job. That was the labor on it.

The Court: Labor from August 28th to October 1st, is [270] that it?

The Witness: No. It was the other delay, from April 15th to October 6th, 1948.

The Court: Is that where your item of \$15,000 comes in?

The Witness: That is right; yes, sir.

The Court: April 15th to October the 6th?

The Witness: That is right, yes, sir; 1948. The other delay took place in '47.

Q. (By Mr. McPharlin): You have stated, in making references, "to when the job was supposed to have been completed." What do you mean by that, Mr. Woolley?

A. When I was completely through with all the work that I was to do there.

Q. Now, you stated, "if the job had been finished when we were supposed to have been completed." When was that? A. April 15, 1948.

Q. What is your basis for stating that?

Mr. Benedict: I believe the contract speaks for

(Testimony of E. B. Woolley.)

itself. The subcontract provides that he shall complete the job April 15, 1948.

Mr. McPharlin: For the purpose of the record, the subcontract states:

“The subcontractor * * * further promises and agrees to prosecute all of his work hereunder diligently and to co-ordinate his work with the work of other persons so that the subcontract may be completed on or before [271] the fifteenth day of April, 1948.”

Q. Did you co-ordinate your work with the other subcontractors? A. I did.

Q. By co-ordinating your work, that means, doesn't it, that you have the necessary employees and the proper force available to carry on your part of the work; isn't that right?

A. I did, and I always did have there.

Q. You have heard Mr. Ferguson, the engineer, testifying that you had sufficient men, I believe he said, to do your part of the work; but he also stated that you were not overstaffed. Do you disagree with him? A. I do.

Q. He also stated that if the progress of this work had been increased two-fold, why, you would have had to increase your staff two-fold; do you agree with that? A. No, sir; I do not.

Q. In addition to these items of these claims that you have put in, Mr. Woolley, have you added anything in addition to what you have claimed are your costs on it? A. Only the labor.

Q. What did you add onto the labor?

(Testimony of E. B. Woolley.)

A. The profit and overhead write-up on the labor.

Q. How much of a profit and write-up did you add onto the labor? [272]

A. In percentages I don't know exactly. It is from the Biddle Book, which is the trade journal giving the write-ups.

Q. Didn't you testify previously that you had added one 15 per cent item and then another 10 per cent item?

A. I believe that is what it amounts to in the front of their book, how they arrive at their labor charge.

Q. So you increased it, you added another 25 per cent onto the labor cost, is that correct, onto your direct labor cost? A. That is right.

Q. So in addition to duplicating your labor charge between the labor you claim for damages and the labor you claim for fixtures at Muroc, you also added another 25 per cent?

A. Legitimate write-up; that is right.

Q. How did you arrive at this labor claim that comes out to an even \$4,800 for hanging fixtures? Do you have an actual log book on that?

A. I do.

Q. Where is the log book?

A. In my briefcase over there.

Q. Will you produce the log book?

The Court: We will suspend at this time.

Mr. McPharlin: Yes, your Honor.

The Court: Resume at 1:30. [273]

(Testimony of E. B. Woolley.)

Mr. McPharlin: Yes; 1:30 is agreeable.

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day, Friday, May 19, 1950.) [274]

Los Angeles, California,
Friday, May 19, 1950, 1:30 p.m.

Cross Examination—(Resumed)

The Court: Proceed.

Mr. McPharlin: Yes, your Honor.

Q. (By Mr. McPharlin): Mr. Woolley, you have testified that prior to entering into this subcontract you had a discussion with Mr. Radkovich in reference to the chimes, and he told you that you would not need to figure them, is that right?

A. That is right.

Q. Now I will show you a letter on your letterhead, addressed to Mr. Parks of the Radkovich Company, which is dated September 24, 1947, which purports to be signed by you and ask you if that is your signature?

A. That is my signature.

Q. And did you send that letter to the Radkovich Company? A. I did.

Q. This letter is dated September 24, 1947, which was almost two months after you entered into the subcontract, wasn't it? A. Yes, sir.

Q. In this you state:

"Dear sir: [275]

"In handling the preparations for the above job,

(Testimony of E. B. Woolley.)

it has come to our attention that there are some intended additions to the work as originally specified.

“These items are as follows:

“1. The addition of a telephone outlet in each resident, exact location unknown.

“2. The addition of a front and back door signalling system, including a two-tone chime, transformer and push buttons.

“If these additions are to be made would you please confirm same by letter, giving complete details.”

“As it is our endeavor to do everything possible to expedite the production of these houses, we will take the necessary steps to include these items in the installation immediately upon receiving your confirmation. Renegotiation of the subcontract, which is necessitated by these additions, can be done at a later date.

“Yours truly,

(signed) E. B. Woolley”

Is that the letter you sent?

A. That is right.

Q. You have made no reference in this letter to any previous conversation with Mr. Radkovich in reference to chimes, have you? [276]

A. No, sir.

Q. And you state here that in handling the preparations, it has come to our attention that there are chimes to be placed in these houses, is that

(Testimony of E. B. Woolley.)

right? A. That is right.

Q. And this was approximately two months or more before the time you were supposed to have had the discussion with Mr. Radkovich in reference to the chimes?

A. I think that is when I seen that other plan.

Mr. McPharlin: We will offer this into evidence as Radkovich's next exhibit in order.

The Court: It may be received.

The Clerk: That will be Radkovich's Exhibit M into evidence.

Q. (By Mr. McPharlin): Also you make no reference in that letter to fixtures, do you, Mr. Woolley? A. No, sir.

Q. I believe you have previously testified that the question of fixtures was not brought up until you came in in the latter part of August and had the discussion with Mr. Parks that we have gone into, isn't that right? A. That is correct.

Q. But you state that you had a discussion in reference to chimes with Mr. Radkovich before you signed the subcontract?

A. That is right. [277]

Q. Your subcontract was signed July 30, 1947, was it, Mr. Woolley? A. That is right.

Q. When did you have that discussion with Radkovich?

A. Before that date. I don't recall how long before that date.

Q. When did you first start figuring your bids on this job?

(Testimony of E. B. Woolley.)

A. About 30 days previous to the signing of the contract.

Q. July?

A. I would say so. I think it was around the 15th of July I took the plans home.

Q. Around the 15th of July you took the plans and specifications? A. That is right.

Q. Mr. Woolley, look on your deposition at page 4. A. I don't have one now.

Q. On page 4, at lines 16 to 18, or you may read from line 11 down to line 22, I believe. Now, I will read the questions and the answers that I have referred to, Mr. Woolley.

“Q. About when was it that he asked you if you would like to figure the job? And in reference to that question I might state that your subcontract [278] is dated—

“A. I know, it's July 30th.

“Q. Yes, if that helps you.

“A. It was around the 15th of June when he delivered me this plan I have and the set of specifications that I have.

“Q. Around June the 15th?

“A. June the 15th, I believe it was. It was late in June. I would say it was after the middle of the month, or around the middle of the month.”

Is that true? Was that your answer to my questions? A. That is true.

Q. So you had the plans and specifications for approximately a month and a half before you entered into or signed the subcontract, is that right?

(Testimony of E. B. Woolley.)

A. That is right.

Q. And during that month and a half, I believe you have already testified that you assumed the prime contractor would furnish the electrical fixtures, but that you never brought that to his attention; you never asked him about it?

A. No; I guess that is right, because that is the general plan around Los Angeles and the way they do those things.

Q. That during that time you assumed that he would furnish the chimes, also, but you state that you did have a [279] conversation with him about the chimes?

A. That is right; I had a conversation about the chimes and the pilot lights and motors, motor disconnects. I don't recall the fixtures. I probably took it for granted that they were not on the plan, just to leave them off like he told me with the chimes, not to figure them.

Mr. McPharlin: You may have the witness.

Redirect Examination

Q. (By Mr. Benedict): Mr. Woolley, can you tell us what is meant by "type numbers" in reference to fixtures?

A. That would be catalog numbers describing the fixtures and the price of the fixture.

Q. And can you give us an example of a type number?

A. Well, it would be, say, a Wagner-Woodruff

(Testimony of E. B. Woolley.)

fixture No. 132, would be a kitchen fixture at a set price.

Q. Can you state whether or not that, in the terminology of your trade, is what would be indicated on a drawing if the type numbers of the fixtures are set forth?

A. That is what would be indicated; that is right.

Q. These symbols that Mr. McPharlin has questioned you about that appear on the drawings, which refer to wall brackets or ceiling lights and what not, or fluorescent lights, are those symbols the same thing as type numbers?

A. No; they are not. They are used by—they have a [280] reference down there because different architects use different symbols; and that is just to show what is meant by a ceiling outlet, what is meant by a bracket outlet, and what is meant by a duplex receptacle, and what is meant by a switch.

Q. Will you state whether or not those symbols that appear on the drawing, that is, the first drawing that you had, relate to outlets, that is, to the fixture that is to go in the outlet?

A. No; they do not.

Q. Can you state whether or not those symbols merely refer to the type of outlet that is to be installed?

A. That is correct.

Q. And the type of outlet is not the same thing as the type of the fixture, is it?

A. Absolutely not.

Q. Can you state whether or not it is true that

(Testimony of E. B. Woolley.)

for a wall bracket, for example, there are numerous type numbers that are applicable to a wall bracket?

A. That is right. I would say that there were thousands and thousands of type numbers.

Q. Would that likewise be true as to ceiling outlets and all of the other types of outlets that are indicated there? A. Absolutely, absolutely.

Q. In reference to a fluorescent type outlet, can you state whether or not it is true that there are numerous types [281] of fluorescent fixtures?

A. There are numerous types and numerous manufacturers.

Q. Can you state whether or not it is true that the type of outlet is merely an indication of the general classification of the fixture that is to be used in conjunction with that outlet, and does not indicate in any way that particular fixture that is to go in it? A. That is true.

Q. I call your attention to Radkovich's No. M that you have just identified, and ask you whether or not this letter was written by you after you had received the second drawing?

A. Well, it was after I received the third drawing.

Q. After you received the third drawing?

A. That is right. It was not approved yet, but it was a drawing that was submitted and I had a copy of it, and my men give it to me on the job. It was a copy they were told they were supposed to wire to. My foreman gave it to me, and it was not approved yet, but that is what I expected later.

(Testimony of E. B. Woolley.)

Q. The conversation that you testified you had with Mr. Radkovich in which he stated that you need not worry about the chimes or the circuits if they were not on the drawing, will you state whether that conversation was in reference to the first drawing that you had?

A. Yes; it was. It was before I signed the contract, and I never seen any other drawing until after I signed the [282] contract.

Q. Will you state whether or not it is true that you wrote this letter of September 24th, 1947, Radkovich's No. M, after you had been supplied with the third set of drawings?

A. That is correct.

Q. Calling your attention to August, 1948, were you having any difficulty at that time in proceeding with your work in reference to some wall heaters that were to be installed?

A. Yes; I was.

Q. What was the difficulty at that time?

A. The Wm. Radkovich Company removed the heaters from my store room and sent them to Los Angeles to have something they made a phone deal with the army to install in them, and I could not install them because they were not there. I might add, they removed them under protest. I never gave them permission to remove them. They shouldn't have been removed.

Q. I call your attention to Radkovich's No. L, being the letter from Mr. Ferguson of July 26, 1948. Was it during that period that you were hav-

(Testimony of E. B. Woolley.)

ing your difficulties in proceeding with the installation of the heaters?

A. I believe it was.

Q. Did you ever have a conversation with Radkovich relative to your installing the fixtures?

A. I did. [283]

Q. And when was that conversation?

A. That I can't remember.

Q. Was it in 1948 or in 1947?

A. I believe it was in '48.

Q. Was it around April, when your contract was to have been completed, or before that?

A. April 15th of '48?

Q. Was it around that date?

A. That we discussed the fixtures?

Q. Yes.

A. No. It was before that. Well, I guess—I can't remember exactly the date. It might have been around that date.

Q. In any event can you recall whether or not it was the first part of 1948?

A. I think it was in the first part of 1948.

Q. And where did that conversation occur?

A. In Mr. Radkovich's office.

Q. And who else was present?

A. Parks, I suppose. He was there all the time.

Q. And what was said relative to your hanging the fixtures?

A. Well, they said if they bought them and took them up to the job, why, would I install them? I said if he would pay me for installing them, I

(Testimony of E. B. Woolley.)

would be glad to install them. [284] And he agreed he would pay me for installing the fixtures. And he also said that we would argue about who was going to pay for the fixtures later on in the job.

Mr. Benedict: I believe that is all, if the Court please.

Mr. McCall: Nothing further from the surety.

Mr. McPharlin: I have a few more questions I would like to ask, your Honor.

Recross Examination

Q. (By Mr. McPharlin): You said that Radkovich also agreed to pay you for installing the fixtures?

A. Installing the fixtures; yes, sir.

Q. I want to call to your attention your letter of June 12, 1948, your Exhibit No. 10, which is addressed to "William Radkovich Company, Inc.," wherein you state:

"Gentlemen:

"This is to advise you that I shall resume work under Sub-Contract Re War Department Construction Contract No. W-04-353-eng-2050, between you as contractor and myself as sub-contractor, on or before the commencement of the work day on Monday, June 14th, 1948.

"Such resumption of work by me shall be without prejudice to any rights or remedies which I may now have against you in connection with, arising out of [285] or under said sub-contract, and, without affecting the generality of the foregoing,

(Testimony of E. B. Woolley.)

particularly those matters referred to in the letters of my attorney, Frank M. Benedict, to you dated April 29, 1948, and May 8, 1948, and shall for no purpose be deemed, considered or construed as a waiver upon my part of any of said rights or remedies.

“You are hereby notified that I shall hold you liable for any and all damages and loss resulting to me in the future from your failure to proceed with reasonable diligence with other work on the job.”

You made no reference in there to any oral agreement, did you, Mr. Woolley? A. No.

Q. Did you get any written agreement on this promise to pay you for the labor of installing fixtures? A. Out of Radkovich?

Q. Yes. A. No, sir.

Q. Did you obtain a written agreement of any kind on a promise to pay you for the chime circuits? A. No, sir; I took him at face value.

Q. These were all oral conversations?

A. That is right.

Q. Nobody else was present? [286]

A. Well, probably Parks was.

Q. And you made no reference to it in any of your correspondence?

A. Only that one letter; that is the only thing.

The Court: Is there anything in the contract or specifications requiring something in writing for additions or changes?

Mr. McPharlin: Yes; there is, your Honor. In the subcontract, paragraph 2, it states the consideration of \$80,000 and then goes on to state:

(Testimony of E. B. Woolley.)

“All of such work-to be done, services to be rendered and materials to be furnished shall be in strict accordance with the specification, schedules and drawings applicable, all of which same hereby are made a part hereof, and none of the same may be altered, changed or modified in any manner or respect without the written consent of the contractor being first had and obtained.”

It also goes on further in paragraph 5, at the bottom of page 2:

“Subject to the approval of the United States of America through its duly authorized representatives with respect to said principal contract, or at the request or direction of said United States of America, or its duly authorized representatives, the contractor, [287] by written order, may change the extent or amount of the work covered and to be covered by this sub-contract, * * * ”

It refers again to “written order.”

Mr. McCall: May I ask what paragraph that was of the subcontract?

Mr. McPharlin: Paragraph 5.

The Court: What about additions; is there any clause on additions?

Mr. McPharlin: Just a moment. In the subcontract it makes that provision I have just read, in two places, as to written change orders, and then it goes on in reference to an “equitable adjustment” by saying: “but if any such change causes a material increase or decrease in the amount or character of such work, the contractor will make such equit-

(Testimony of E. B. Woolley.)

able adjustment as may be authorized and approved by the United States of America of and in connection with the consideration and payments to be made to the sub-contractor hereunder.”

The Court: You would consider an addition as coming in under that category?

Mr. McPharlin: Yes, your Honor.

The Court: Of alterations or changes?

Mr. McPharlin: Yes; I would certainly consider any change [288] that would alter that sub-contract price would certainly be a change which would require a written order.

Q. You have mentioned about not having exact type numbers of fixtures in these specifications. Isn't it true that also on other electrical materials they did not have exact type numbers or brand names, but that you submitted to the Government a catalog and also a list of the electrical materials that you were going to use for their approval?

A. That is correct; but they give a certain specification of the material to be used. It had to come up to that Government specification, and that requires or gives two or three brand names of the material that you could use.

Q. All specifications do not give you the brand names, do they, Mr. Woolley?

A. I believe they do; yes, sir.

Q. Will you show me where they give you the brand names that you must submit in these specifications?

(Testimony of E. B. Woolley.)

A. If you will hand me one, I will be glad to look. Section 15.

Q. I have that. A. 15-01, page 15-1.

Q. I have that.

A. You see "a. Federal Specifications."?

Q. Yes.

A. There it goes ahead and gives everything to be used [289] in the house.

Q. Where does it give the brand names?

A. Well, I picked up the Federal specifications to get those brand names.

Q. Then they are not in these specifications?

A. No. They give the numbers of the Federal Specifications. They are general and they apply to every job.

Q. In other words, on ordinary electrical materials you, yourself, had to make up and submit to the Government in detail just exactly what brand name and the catalog list, etc., of the exact materials for their approval, isn't that correct?

A. Yes; all approved Federal specifications.

Q. Then they would approve it?

A. That is right. You had three or four choices in there, and then they would approve any leading or any first line of these three companies or four companies.

Q. Yes. And subsequently, after all of this dispute, in fact you did go back on this job under the terms that we have referred to, and you did also submit a list of electrical fixtures and they approved it, didn't you?

(Testimony of E. B. Woolley.)

A. Yes. I had one heck of a time getting them to. The army didn't know what they wanted. Nobody knew what they wanted. And finally they made up a list of fixtures that they did want, but with the prices, for Wm. Radkovich Company.

Q. And you submitted that list and they approved it, [290] didn't you?

A. I done it at Mr. Radkovich's insistence; that is right.

Q. That is what I mean; you did submit a list of electrical fixtures and the Government did approve that?

Mr. Benedict: May I ask, Mr. McPharlin, if you are referring to the letter that we wrote?

Mr. McPharlin: Yes; there is a letter from Mr. Woolley submitting to the Government a list of electrical fixtures, and the Government approved them, and those were the fixtures that were installed, weren't they?

A. That is true, but I had to go to the Government.

Mr. Benedict: I just wanted it clear there we submitted the list and made our position clear. We did not feel obligated to do so.

Mr. McPharlin: There is no dispute about it, Mr. Benedict, that at the time you submitted that list you were denying liability?

Mr. Benedict: Yes; that is what I want to make clear.

Mr. McPharlin: That is true. I will admit that.

The Witness: I want to bring out about there

(Testimony of E. B. Woolley.)

was nobody that knew what type of fixtures to go in this type of building. There was no specifications for the fixtures.

Mr. McPharlin: No further questions, your Honor.

Mr. Benedict: That is all. Excuse me just a minute. [291]

Redirect Examination

Q. (By Mr. Benedict): Mr. Woolley, during the noon recess have you checked the point Mr. McPharlin called your attention to, that the item of \$4,800 for hanging the fixtures is duplicated in the charge for the item for delay?

A. Yes; I have, and I believe that it is correct; it was a bookkeeping error that it came in that way.

Mr. Benedict: If the Court please, in connection with the amendment to our cross-claim that I desire to file along the lines indicated yesterday, I would like to also correct that error. It is purely an inadvertence. Perhaps it is my fault. I don't know. We did not intend to make any such duplication as that.

The Court: Very well.

Mr. Benedict: And while I am filing my amendment, I will also correct that item, too.

Mr. McPharlin: Is that all, Mr. Benedict?

Mr. Benedict: That is all.

Mr. McPharlin: I have another question, if I may.

(Testimony of E. B. Woolley.)

Recross Examination

Q. (By Mr. McPharlin): Mr. Woolley, your subcontract provides, on page 1, the fourth paragraph or the third paragraph—the third and fourth paragraphs, I believe—that the principal requires the [292] contractor to perform certain services, to furnish certain labor and materials, etc.; that you have read and are fully familiar with the terms and provisions of the principal contract and the rights, powers, benefits, duties and liabilities of the contractor. And further on it states that you agree to discharge certain of the duties of the contractor and to be bound by the obligations of the prime contract insofar as your work is concerned. Now, we have made previous reference to the completion date and you have also made a number of references to April 15th. Do you know that there is a change order in that prime contract extending the completion date?

A. No, sir. I have never seen the prime contract.

Q. Do you know that there is a change order extending the completion date to the first day of June, 1948?

A. That is the first time I have ever seen it.

Q. Were you assessed any penalty by the prime contractor or anybody else because your work was not completed by that date?

A. Good God! I couldn't complete it. He wasn't ready for me to complete it.

Q. Would you answer the question, though?

(Testimony of E. B. Woolley.)

A. No.

Q. There was no penalty assessed against you by anybody, was there? A. No. [293]

Q. There were numerous other subcontractors also on this work, weren't there?

A. That is right.

Q. There was a Gunitite subcontractor, wasn't there?

A. I believe he was broke on the job.

Q. He went broke on the job?

A. I am quite sure of it; yes, sir.

Q. I guess everybody went broke on the job, didn't they? A. Almost; yes, sir.

Mr. McPharlin: Including the prime and all the subs. No further questions.

Mr. Benedict: That is all.

Mr. McCall: Nothing further.

Mr. McPharlin: Do you rest, Mr. Benedict?

Mr. Benedict: Yes. Woolley rests, if the Court please.

Mr. McPharlin: Does the Glens Falls rest?

Mr. McCall: I would like to know if the cross-plaintiff against the surety Glens Falls has brought into Court today the data requested in Glens Falls' Exhibit No. 8 which Mr. Parks, I believe, testified to yesterday.

Mr. McPharlin: I believe that was the personal notes of Mr. Parks' with reference to his phone call that he testified he made to you, Mr. McCall.

Mr. McCall: Well, I would be satisfied with any data which would answer the questions, which I

have never been able [294] to get; and if the counsel has it now, we can read the questions again and I will take the evidence now the same as if it had never been asked for.

Mr. McPharlin: As I understand, Mr. McCall, the answer to your question is in the letter of July 8th from the prime contractor to the Glens Falls Indemnity Company.

Mr. McCall: Is that in evidence, Mr. McPharlin?

Mr. McPharlin: Yes; that is in evidence.

Mr. McCall: I wish you would call my attention to that. I will see if the answer is there.

Mr. McPharlin: Okay. The exhibits of Radkovich. There is a full-page letter dated July 8th, addressed to "E. B. Woolley," a carbon copy to Glens Falls Indemnity Company, a signed post office receipt, setting out the default in detail of E. B. Woolley as claimed by Radkovich.

Mr. McCall: Then may I read these questions and would it be all right for counsel to read the answer contained in that letter? The first question——

Mr. McPharlin: I think it is better just to refer the exhibit to you, Mr. McCall.

Mr. McCall: I claim it is not in there.

The first question, the nature of the default——

The Court: Pardon me just a moment. You asked for this data?

Mr. McCall: Yes, sir. [295]

The Court: And you do not have it? Those pencil notations?

Mr. McPharlin: As I understand it, yesterday Mr. Parks made reference to personal pencilled notations at the time of his telephone conversation with Mr. McCall. Last night I went through all my files—I have numerous files of Radkovich Company—together with Mr. Parks, and I was unable to locate those pencilled notations.

Mr. McCall: Is it possible for the cross-claimant, then, against Glens Falls to supply the information from any source?

Mr. McPharlin: Oh, it is just a matter of an issue in the lawsuit, Mr. McCall.

The Court: You asked for certain information in the letter, and the witness stated that he gave that verbally over the phone and he made a pencilled notation of it.

Mr. McCall: Yes.

The Court: Now it is claimed by Radkovich that your questions have been answered in some other manner by way of letter. What letter is this, now?

Mr. McPharlin: There is a letter in the exhibits that have been introduced, your Honor, which is a letter dated July 8th from Wm. Radkovich to E. B. Woolley, a carbon copy to Glens Falls Indemnity Company, and there is attached thereto the return receipt of the post office department showing it was received by E. B. Woolley and signed by B. L. [296] Boggs; that it was received by the Glens Falls Indemnity Company, signed by what appears to be the name of Angelo Woods.

The Court: That is what exhibit, attached to what exhibit?

Mr. McPharlin: That is attached to Radkovich's Exhibit F, and is the next to the last letter in the file.

In addition to that letter to the Glens Falls Indemnity Company there is also a subsequent letter of July 26, 1948, addressed to E. B. Woolley, with also a copy sent to the Glens Falls Indemnity Company.

Mr. McCall: As I understand it, this counsel for Radkovich Company states that those letters he has just referred to is the reply to the letter of June 11th which is the defendant surety company's Exhibit 8 here. If that is his statement, then anything else would be argumentative.

May it be stipulated that if I were sworn as a witness, I would state that I never had the conversation with Mr. Parks that I mentioned yesterday and have never received a letter giving the information requested in Defendant's Exhibit 8, dated June 11, 1948?

Mr. McPharlin: I will stipulate that if you were sworn as a witness you would testify that you have not had that telephone conversation. But in reference to the letter, I think, Mr. McCall, in the ordinary course of events that letter was forwarded to you. Do you want to testify that that letter has never been forwarded to you by the Glens Falls?

Mr. McCall: I will testify that I have never received a letter giving the information requested

in my letter addressed to Radkovich Company June 11, 1948.

Mr. McPharlin: I won't stipulate to that, Mr. McCall, because I believe we are quibbling over terms now.

The Court: A little louder, please.

Mr. McPharlin: I won't stipulate to that. I believe we are quibbling over terms now, your Honor.

Mr. McCall: I did not understand what counsel said he would not stipulate to.

Mr. McPharlin: I will not stipulate that you have never received——

Mr. McCall: No; that is not the question. My question is: Will it be stipulated that if I were sworn as a witness and took the stand, that I would testify that I had never received the answer to this letter of June the 11th which I wrote in behalf of Glens Falls, and that I have never received the information in reply to that letter on the telephone or by letter? That is what I would testify to if I took the stand.

Mr. McPharlin: Oh, then I will agree that you would so testify, if you say so, Mr. McCall.

Mr. McCall: That is all.

Mr. Benedict: That is all, your Honor.

Mr. McPharlin: I would like to call Wm. Radkovich for one [298] question in rebuttal, your Honor.

WM. RADKOVICH

recalled as a witness on behalf of defendants, cross-claimants, and cross-defendants in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McPharlin): Mr. Radkovich, did you at any time prior to July 30, 1948, the date of this subcontract, have any discussion with Mr. Woolley with reference to the chimes question on his subcontract? A. No; I did not.

Mr. McPharlin: No further questions.

Mr. Benedict: No questions.

Mr. McCall: One more question, may it please the Court. Will the Court just excuse me a second?

Cross Examination

Q. (By Mr. McCall): Mr. Radkovich, at the time you state that you loaned 4,000 to Mr. Woolley did you notify the Glens Falls of that incident?

A. I didn't loan it to him.

Mr. McPharlin: Just a moment, I will object, your Honor, as not within the scope of cross examination. The direct examination has been directed to one point. [299]

The Court: I think there was some testimony along that line before.

Mr. McCall: I think there was. I just wanted to be sure and get it in there, if it is not in there.

The Court: I think the witness stated or somebody stated here.

Mr. McCall: Then, may I ask if the deposition

of Mr. Radkovich has been properly executed and returned to the Court?

Mr. McPharlin: Yes; it has. I am glad you reminded me, because I have not put in Mr. Woolley's.

Mr. McCall: Would you like to introduce that into evidence, Mr. McPharlin?

Mr. McPharlin: Yes; I would.

Mr. McCall: I have no objection.

The Court: The entire deposition?

Mr. McCall: Mr. Radkovich's deposition, is that what I understand?

Mr. McPharlin: The original deposition of Mr. Woolley, I understand, has not been filed, and I believe it should be filed, your Honor.

The Clerk: Ordered filed, your Honor.

The Court: It may be filed. What do you intend to have done with it? Is there some portion of the testimony to which you wish to refer?

Mr. McPharlin: We have already referred in the testimony [300] to Mr. Woolley's deposition.

The Court: Yes.

Mr. McPharlin: And we have gone into it, so I believe it should be in evidence, your Honor.

The Court: In certain respects as to those matters.

Mr. McPharlin: Yes.

The Court: Any objection to that?

Mr. McCall: No objection from Glens Falls.

The Clerk: Your Honor, am I to understand that this deposition is also to be marked as an exhibit, in addition to being filed?

The Court: I do not know.

Mr. Benedict: It is only being admitted, as I understand it, for the purpose of the portions referred to. Of course, those are already in the record when they were read by Mr. McPharlin. Whatever he wants to do, though.

The Court: In other words, you want this filed so it will be on file?

Mr. McPharlin: Yes; I believe it should be on file with the records, your Honor.

The Court: In order that you might refer to those matters concerning which you have inquired, and nothing else in the deposition, is that correct?

Mr. McPharlin: Yes, your Honor.

The Court: Is that the understanding? [301]

Mr. Benedict: That is my understanding of what he is offering it for; yes. That is all ight. I have no objection to that.

The Court: Both portions of it may be received for that purpose into evidence. Is that what you want?

Mr. McPharlin: Yes, your Honor.

Mr. McCall: Did I understand that counsel for Radkovich Company was going to introduce into evidence his deposition?

Mr. McPharlin: No. It was Woolley's deposition that I had used. I have made no use of Radkovich's.

Mr. McCall: Has Mr. Radkovich's deposition, may I inquire, been properly returned and filed?

Mr. McPharlin: No. I have it here. It was been verified and executed or signed by Mr. Radkovich.

Mr. McCall: Well, isn't it proper that it be filed with the Court?

Mr. McPharlin: Yes. Do you wish it filed with the Court?

Mr. McCall: Yes, please. If that is agreeable with the Court?

The Court: That should be filed the same as the other deposition.

Mr. McCall: Yes.

The Court: As part of the files.

Mr. McCall: As part of the file. I am a little uncertain——

The Court: In other words, the parties themselves have [302] appeared here as witnesses and testified. You are not attempting to duplicate that testimony, but you are merely emphasizing certain portions of that deposition or both depositions to which you have referred in your questioning and answering.

Mr. McCall: I think it is proper in a case of this kind, if the counsel stipulate, that it might be read by the Court with the other evidence.

The Court: If you wish to do that, then it might be received for that purpose, if that is what you want.

Mr. McCall: I would stipulate that both the depositions may be read by the Court along with other evidence.

Mr. McPharlin: I will accept the stipulation, your Honor.

The Court: I don't know, now. I do not want to have too much confusion here. I have troubles

enough to go over the testimony in this case.

Mr. McCall: They are short, your Honor.

The Court: All right.

The Clerk: I am merely filing these two depositions, your Honor. I am not giving them exhibit numbers.

The Court: The stipulation is now that both of these depositions be filed and that they may be read by the Court in connection with all the other evidence.

Mr. McCall: That is right.

Mr. Benedict: That is correct, your Honor. [303]

The Court: Anything further?

Mr. McCall: There is nothing further. We were just wondering if this was going to be submitted on briefs, or if it was just going to be submitted.

The Court: I was waiting for you gentlemen to conclude your evidence. If you are through now, we can discuss these other items. Has everybody rested now?

Mr. Benedict: We have, your Honor.

Mr. McPharlin: Yes, your Honor.

Mr. McCall: There is nothing further. Yes; the cross-defendant Glens Falls Indemnity Company, the surety for the subcontractor, also rests.

The Court: There is a mass of documentary evidence which requires reading and digesting in connection with the evidence. Do you gentlemen intend to have the evidence written up?

Mr. McPharlin: How do you mean, your Honor, written up?

The Court: A transcript.

Mr. McCall: I would say not, your Honor.

Mr. McPharlin: No.

Mr. McCall: I think the Court has all the notes that are necessary, and we have our points and authorities in the hands of the Court. I would not think it would be necessary to have the evidence written up. However, if the Court should want the advantage of that, I will be glad to pay my part.

The Court: I have taken notes but, of course, the notes [304] are not as complete as they might be. I would have taken more elaborate notes had it occurred to me that in connection with some of these recitals in the contract and specifications and in the correspondence it might be necessary and advisable to see just what the testimony is in that regard.

It would be of assistance to the Court if I had the transcript, if you gentlemen do not object.

Mr. McPharlin: Excuse me. Was the Court making reference to whether or not we would request a transcript of the reporter?

The Court: Yes.

Mr. McPharlin: Yes. We, on behalf of my client, would be very happy to request a transcript to make it available to the Court.

The Court: There are mixed questions of law and fact in this case, and insurance policies and the contracts and plans and specifications and testimony relating to every phase of these negotiations. I would feel a little more secure if I had a transcript before me. Of course, my notes will assist me to find the places I am looking for so I can

consider the evidence in connection with that.

Mr. McCall: I think it is liberal of counsel offering to pay for that.

The Court: Well, that is a matter for them.

Mr. McCall: We will be glad to help him out.

The Court: I would like briefs filed, and then after I have read and digested everything, I may or may not want oral argument, depending on circumstances. Let us say 10 or 15 days on a side.

Mr. Benedict: I have this suggestion to make, your Honor: In view of the fact that the transcript will be written up, that the time for filing briefs start running from the time we have that transcript, so then we will be able to refer probably to the transcript.

The Court: Yes; you can make your argument after you have your transcript and give me a brief. You just use your own judgment as to what you want to set out, in view of the fact that we will have a transcript.

Mr. Benedict: That is right. I think 10, 10 and 5, commencing from the time the transcript is ready would be ample.

Mr. McPharlin: That would be satisfactory.

Mr. Benedict: Would you open, then?

Mr. McPharlin: Yes.

Mr. McCall: If one of us finds ourself in a position of being in a long trial some place, is there any easy way that we can extend that time?

The Court: Oh, we are never exacting in those matters. Counsel ought to have time enough to present what they wish.

Mr. McCall: I imagine, then, it would be proper in that [306] condition that the counsel would stipulate to that and then submit it to the Court for approval. Would that be satisfactory?

The Court: Yes. If you gentlemen agree among yourselves, you do not need to do any more than submit the stipulation to me and I will approve it. Otherwise, if you have any trouble along those lines, let me know.

Mr. McCall: Then after we have this transcript and draw our briefs, would the briefs be in the regular form of a brief or points and authorities?

The Court: Make your argument, if you wish, in the brief, and set out your points and authorities, because that is all that I may need. I may not require any oral argument after I read them.

Mr. McCall: Yes. Then if the Court is satisfied after it gets the points and authorities and transcript, next will follow the judgment of the Court without any oral argument.

The Court: If the Court is satisfied, you will be so notified. But I will set a date for further proceedings in this case. We may or may not have further proceedings, depending on how it looks to me after I have finished reading your briefs and your arguments.

Mr. McCall: Yes, your Honor. My point is this: That in the event judgment is handed down without oral argument or anything further after the briefs, is it in order now and [307] may it be stipulated that judgment for anyone be stayed until 10 days

after the determination of a motion for a new trial, if one is made promptly?

The Court: You will have ample time. I am going to set a date now. After this time shall have expired for the filing of these briefs, I will set a date for further proceedings or argument, and at that time I may render a decision or may not, and I may have oral argument or I may not, but the probability is that I shall have digested your briefs and probably will be ready for pronouncement of decision. And then following that, of course, someone will be authorized or directed to prepare findings and judgment, and that may take a little time before those are settled. Those matters sometimes require discussion before findings are finally made.

You will have ample time to have execution stayed, whoever may be in that position.

Is 10, 10, and 5 enough, now? There are three parties here, aren't there? One party is out; that will be Westinghouse. They do not need to submit anything. So you will open, Mr. McPharlin?

Mr. McPharlin: Yes; I will submit the opening brief, your Honor.

The Court: 10 days after you have been furnished——

Mr. McPharlin: With the reporter's transcript here. [308]

The Court: ——with the reporter's transcript. Then the other side, both the Glens Falls and Woolley, will present theirs, is that it?

Mr. Benedict: That is right. We can put ours in, but separate briefs, at the same time.

The Court: That is right. Then you will have 5 days to respond.

Mr. McPharlin: Yes, your Honor.

The Court: Where will that take us to? Of course, I do not know now exactly how long the reporter is going to be. Let us say it will take two weeks. Today is May the 19th and two weeks from today will give us until June the 2nd. Then if counsel are going to take 25 days, that will take us to June 27th when the last briefs should be in. I will be on a vacation in July, so I won't be able to give this any attention until August. We can set a date in August unless you gentlemen take your vacations in August.

Let us find a date in August, and I will be up here for that purpose so you won't have to come to San Diego. I would rather make it on, say, Tuesday, August the 15th, or Wednesday, August the 16th. I think I have to be here, anyhow, at that time. Is that agreeable?

Mr. McCall: Either one, your Honor.

Mr. Benedict: Either date.

The Court: Say Wednesday, August 16th. [309]

[Endorsed]: Filed October 30, 1952.

[Title of District Court and Cause.]

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

Los Angeles, Calif., January 26, 1951

Honorable Jacob Weinberger, Judge Presiding.

Appearances: Glen Behymer, appearing on behalf of the plaintiff. Anderson, McPharlin & Connors, by Eldon V. McPharlin, appearing on behalf of Wm. Radkovich Company, Inc., and its sureties. John E. McCall, appearing on behalf of Glens Fall Indemnity Company. Frank M. Benedict, appearing on behalf of E. B. Woolley.

GEORGE B. ALLISON

called as a witness by and on behalf of the Court, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: George B. Allison.

The Court: I am going to ask Mr. McPharlin to inquire of Mr. Allison, as to his qualifications, or, if counsel prefer, you may cover it by stipulation. I assume that Mr. Allison is the Court's witness.

Mr. McPharlin: That is right.

Mr. Behymer: We would stipulate to Mr. Allison's qualifications.

The Court: The Court is interested in knowing the type of construction with which the witness is familiar and has had experience as an architect.

(Testimony of George B. Allison.)

Also, including, of course, any government construction, as we are concerned here with that phase of the case.

Mr. McPharlin: I will question the witness briefly as to his past experience.

The Court: If you will, please. Cover, also, whether or not the witness has drawn any plans, specifications for government construction, and if so, what the projects were and under whose auspices the work was done, that is, which department of the government. I would like to have the record complete on that subject.

Direct Examination

Q. (By Mr. McPharlin): Mr. Allison, what is your business or occupation? A. Architect.

Q. You are a licensed architect in the State of California? A. Yes, sir.

Q. Are you a member of the American Institute of Architects? A. Yes, sir.

Q. Do you hold a college degree in architecture?

A. Yes.

Q. From what school?

A. University of Pennsylvania.

Q. For how long a period of time have you been a licensed architect? A. Since 1934.

Q. You have been engaged in the profession of an architect since that time? A. Yes.

Q. You are a member or a partner of a firm, are you, Mr. Allison? A. That is right.

Q. What is the name of that firm?

(Testimony of George B. Allison.)

A. Allison & Rible.

Q. Do you specialize in any type of work or architecture? A. No, sir.

Q. Generally speaking, what type of architecture or work have you done the most of?

A. Our practice embraces a general field of construction, exclusive of residential. We have done a number of institutional buildings for educational institutions. Do you wish to have those enumerated?

Q. Let me ask, first: Have you done any United States Government work?

A. At Allison & Rible we have not.

Q. Have you individually at any time?

A. Prior to the formation of our partnership, Mr. Rible and I and another firm executed the architectural work for the Civil and Army Housing for the Victorville Base Airport.

Q. What type of a project was that at the Victorville Base?

A. It consisted of about thirty units for residences, of employees.

Q. Was that under the United States Army or the Navy? A. Army Engineers.

Q. Under the Army Engineers? A. Yes.

Q. Have you had any other government or United States Government projects, other than that you have worked on?

A. Not as Allison & Rible.

Q. Have you as an individual?

A. Prior to that, Mr. Rible and I were associated on a project for the Army Engineers at

(Testimony of George B. Allison.)

Palm Springs, at Torrey General Hospital. Mr. Rible was the architect and I was his associate.

Q. Are there any other United States Government projects, other than those two, on which you have worked? A. No.

Q. On those two government projects you have referred to, were the plans and specifications prepared by you or under your direction?

A. Yes.

Q. In the preparation of those plans and specifications was there electrical work involved?

A. Yes. Let me qualify your previous statement, in that the work on the Torrey General Hospital was prepared under the direction of Mr. Rible, who was the architect for the work. I was his associate.

Q. On the Victorville job, were those plans and specifications prepared under your direction?

A. They were.

Q. In those units at Victorville, I assume there was electrical work, also? A. That is right.

Q. In preparing the plans and specifications, insofar as the electrical work was concerned, on the Victorville project, was that prepared by you or do you call in an electrical specialist, or what is the procedure on that, Mr. Allison?

A. An electrical engineer was employed by our group, who prepared those particular drawings; consulting electrical engineer is the proper term.

Q. As I understand it, you, as the architect on the over-all project, would employ an electrical

(Testimony of George B. Allison.)

engineer, who would prepare the electrical drawings or maps? A. That is correct.

Q. Now, insofar as specifications for the electrical work would be concerned, who would those be prepared by?

A. They are likewise prepared by the consulting electrical engineer, and modified as might be required, to conform with the balance of the specifications; the entire specification being supervised by our office.

Q. In your profession as an architect on large projects like that, is it the custom for the architect to call in specialists or technical engineers to prepare the plans and specifications for particular trades, like plumbing, electrical and so forth? Is that the way it is customarily handled?

A. It is done in a number of offices in that way. In a few offices in Los Angeles these specialists or experts are employed by the architect and on his payroll, rather than as independent consulting engineers.

Q. They either have a specialist in their office or they call in a specialist? A. That is right.

Q. Insofar as you are personally concerned, Mr. Allison, are you familiar with, shall we say, the details of electrical plans and specifications?

A. To some extent, yes. To some extent, no. The familiarity of an architect is, I would say, limited.

The Court: That is to say, the lighting and fixtures and the wiring, that is all included within the category of the expert?

(Testimony of George B. Allison.)

The Witness: Yes, sir.

The Court: You relied on him entirely for that information?

The Witness: Not entirely. For instance,—May I speak for a moment, sir?

The Court: Yes. Go ahead.

The Witness: For instance, let us take this courtroom here, the architect, no doubt, selected the type of illumination that was planned and built in this courtroom. The electrical engineer would, doubtless, take the general intent of what was desired and work out the details and the technical data required to accomplish what was intended.

The Court: That is, all the planning of the wiring and conduit and everything relating to the job was his job?

The Witness: That is right. The architect frequently selects the fixtures, selects the actual fixtures, and he knows the type of work that will be required or the class of project will require certain types of fixtures which, in general, he supervises and selects.

The Court: And sometimes he designs those fixtures?

The Witness: Yes, in some cases we have actually designed fixtures.

The Court: I think that covers that situation pretty well.

Mr. McPharlin: I had one other question.

Q. (By Mr. McPharlin): On a federal project like that, for example, your Victorville project, did

(Testimony of George B. Allison.)

you work frequently with the United States Engineers or any of their technical men? A. Yes.

Q. Do they have architects or these technical experts in their office?

A. They have a number of employees. The basis of their qualifications for employment are unknown to me. These employees, during the recent war, were trusted with producing a vast amount of plans and specifications. They are usually under terrific pressure and the professional people employed by the Corps of Engineers, as a result, dealt with these employees once the original arrangements had been concluded.

Q. Were you under their direction? Were they under your direction, or what was the relationship between you and the Office of the United States Engineers, in reference to the plans and specifications?

A. We were under their direction.

The Court: Generally, the government has experts who design, who make out layouts for wiring and all that, is that right?

The Witness: I would say no, sir. In the case of the project to which I referred, the wiring layout was made by our office. The selection of fixtures was carefully reviewed with the government experts and so noted on the drawings.

The Court: Now, I imagine you want to proceed with the other matters concerning which you wish to inquire of Mr. Allison.

Who wants to inquire first?

(Testimony of George B. Allison.)

Mr. McPharlin: Shall we proceed with the written interrogatories we previously submitted?

The Court: I think so.

Q. (By Mr. McPharlin): Mr. Allison, written interrogatories have previously been submitted to you by the parties. Have you had an opportunity to go over and review those? A. Yes.

Q. In reference to the written interrogatories proposed by cross defendant Radkovich and his Sureties, the first question was:

“Are there standard symbols recognized in the building trade for lighting outlets? A. Yes.

Q. “Are the symbols shown on Sheet 6 of the Plans such standard symbols?”

A. I think that question should be best answered, for a matter of Court record, by an electrical engineer. In our experience they do not in all cases conform with the practice of our office.

Q. Isn't there in your profession as an architect, or in the electrical business, a standard set of symbols, Mr. Allison?

A. Yes. That was the first question.

Q. The symbols that are on the plans here in question, aren't they symbols contained in that standard set of symbols?

A. They do not in all respects conform with our own practice, no, sir.

Q. Well, in your practice do you follow the standard set of symbols? A. Yes.

Q. Now, on the plans here, I believe there are five or six or perhaps more symbols that are shown

(Testimony of George B. Allison.)

on the plans. Do those symbols appear in the set of standard symbols?

A. I think that the answer to that should, for a matter of Court record, be best handled by an electrical engineer.

Q. The next question, Mr. Allison, "With the amperage predetermined as shown on the wiring diagrams on Sheet 6, would it be necessary to use the descriptive words that follow the symbols for wiring the outlet?"

A. I think that question should be asked an electrical engineer.

Q. The next question is, "Do the words 'wall bracket-switch integral' designate a type of fixture?"

A. My answer would be that it does not designate, but it generalizes it as to type. It is a general classification of type.

Q. The next question, "If so, what type of fixture does it mean?"

A. The word "fixture" does not occur in the question—or in the electrical schedule. However, my opinion would be that it would designate a wall bracket fixture. An answer for the record should come from an electrical engineer.

Q. "Does Sheet 5 of the Plans show a fluorescent fixture in the drawings?" A. Yes.

Q. "Are the locations and designations of the fluorescent fixtures shown on Sheet 6?"

A. Yes.

Q. "From Sheet 6 only, can you determine the

(Testimony of George B. Allison.)

location where the electric panel board was to be installed in the building, or is it necessary to refer to Sheet 1 also of the Plans?"

A. It is necessary to refer to Sheet 1.

Q. "Isn't it true that the letters 'N.I.C.' as used on plans mean 'not included in contract'?"

A. Yes, that is true.

Q. "Isn't it true that on Sheet 1 of the Plans after the descriptive words 'electric range' and 'electric refrigerator,' there are the letters 'N.I.C.'?"

A. Yes.

Q. "Isn't it true that after the descriptive words for light fixtures on Sheet 6, there are not the letters 'N.I.C.,' nor any other indication of their exclusion?"

The Witness: Your Honor, I would like to qualify my reply by this statement: That I question whether on Sheet 6 there are descriptive words for light fixtures. There is a list of symbols called "electrical." It is true that there are no letters "N.I.C." behind the symbols.

Q. (By Mr. McPharlin): Following the symbols there are further descriptive words, are there not, Mr. Allison?

A. The descriptive words on Sheet 6——

Q. Yes, following the symbols.

A. ——are "ceiling outlet, fluorescent, wall bracket-switch integral, duplex receptacle, electric water heater, electric range and motor."

Q. After those words they do not have the letters "N.I.C.," do they?

A. That is right.

(Testimony of George B. Allison.)

Q. "Referring to Sheet 6 of the Plans and the descriptive words which follow the symbols, which of those designate equipment and which fixtures?"

A. I would say beyond any doubt the water heater, range and motor designate equipment. As to the designation of fixtures, I see no mention of the word "fixtures," and I think an answer for the record should come from an electrical engineer.

Q. "Are there standard type numbers for fixtures, or does each manufacturer use his own model or trade designation?"

A. The answer should come from an electrical engineer.

Q. In your experience as an architect, do you know of any standard type number that applies throughout the electrical business to designate a particular fixture? A. No, sir.

Q. "If there are no standard type numbers, is it not customary for the contractor to submit a list of fixtures for approval as required in Section 15-03(b), (c) of the Electrical Specifications?"

A. I think an electrical engineer should answer the question.

Q. The next question is, "Is it not true that the number or model would be furnished by the contractor in his submitted list for approval, which number would be that of the manufacturer selected by him?"

A. Lists of fixtures submitted by contractors are always reviewed by our consulting electrical engineers. I think for the record this question should

(Testimony of George B. Allison.)

be answered by an electrical engineer.

Q. "Does not the wiring diagram on Sheet 6 of the Plans require chimes circuits?"

A. From my limited knowledge and familiarity with this branch of work, I would say yes, it does.

Q. "Is it not true that Paragraph 15-20 of the Electrical Specifications indicates that there shall be installed push buttons for the signalling system at both the rear entrance and front entrance?"

A. At this point would it be proper to read that paragraph?

The Court: Yes.

The Witness: "The contractor shall"——

The Court: A matter of that construction would be if it has reference to other parts of the contract.

The Witness: The paragraph is headed "15-20 Signaling System (For Quarters)."

The Court: Yes, you may read it.

The Witness: "15-20 Signaling System (For Quarters). The Contractor shall furnish and install a low-voltage signaling system consisting of push buttons and musical door chimes, as hereinafter described and where indicated on the drawings. The Contractor shall install dual-purpose, 2-toned, bar-type musical chimes. Tones shall be amplified by two (2) short resonating tubes. Tone bars and operating mechanism for each set of chimes shall be completely concealed by an approved ornamental housing. The signal for the rear entrance shall be distinct from that of the front entrance. Push buttons shall be of the flush type with nickel-plated

(Testimony of George B. Allison.)

trims and 5/8-inch flat pearl centers. Chimes shall be operated by means of an approved 8- to 10-volt bell ringing transformer flush mounted in the service room and connected to the nearest lighting outlet. Signal-system wiring shall be not less than No. 16 gage and shall be installed in conduit only where passing through masonry. No splices shall be made except where they will be accessible upon completion of the building.”

Q. (By Mr. McPharlin): Mr. Allison, on a government contract, isn't it customary for the government, if it is going to furnish any of the materials or equipment, to specifically designate what materials or equipment they will furnish?

Mr. Benedict: I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness on a matter not related to the issue before the Court.

The Court: I think if he were qualified to answer, he might state whether or not there was any custom in that particular field. But I do not think he relies on his own experience. The witness stated he would call in electrical engineers to work out that phase of the work.

Do you feel you can answer that question? I do not mean this particular question, but is there a custom in the trade?

The Witness: I would say that on government—The question had to do with government contracts, and I don't feel I am qualified to speak as to the custom in government contracts. Is that the

(Testimony of George B. Allison.)

correct question? May we have the question read back, sir, please?

The Court: Are you satisfied with that answer?

Mr. McPharlin: Yes. I will go on, your Honor.

Q. (By Mr. McPharlin): In your profession as an architect or in the general building construction business, when a contract is made for the construction of a building for residential purposes, isn't it customary that lighting fixtures are installed by the contractor?

Mr. Benedict: Just a minute. I object to that on the ground the witness testified that his knowledge in this particular line has been obtained other than in residential construction.

The Court: Now, are we within the scope of the questions that were to be asked?

Mr. McPharlin: Those are not——

Mr. Benedict: He is asking some other questions.

Mr. McPharlin: ——in the written interrogatories. I have enlarged on the written interrogatories in these last two questions.

The Court: I am wondering if that is not a matter of cross examination. You have propounded certain questions in your draft and the other side has likewise.

Mr. McPharlin: Shall we confine ourselves to those written interrogatories?

The Court: There seems to be an objection.

Mr. Benedict: My understanding, if the Court please, is we were going to confine ourselves. We

(Testimony of George B. Allison.)

have let Mr. McPharlin ask several other questions. I understood that was the purpose of this hearing, to confine ourselves to these particular interrogatories. That is what we propose to do.

The Court: I think that was the purpose of the routine we would follow, in propounding certain questions and getting the answers.

Mr. Benedict: That is right, your Honor.

The Court: Of course, that does not prohibit or restrict the rights of either side to cross examine.

Mr. Benedict: No; that is right.

The Court: I think we had better stay with our plan.

Q. (By Mr. McPharlin): The next question: "Considering the Plans, Specifications, Contract Documents and Exhibits which have been furnished you, is the Electrical Subcontractor, in your opinion, required to furnish and install the fixtures?"

Mr. Benedict: I object to that, if the Court please, as calling for a conclusion of the witness on the very matter that is the Court's province to decide.

The Court: Well, he may answer, I think, if he bases his answer on what appears in the Plans and Specifications.

Can you answer that?

The Witness: I would say, in reply, that is the most critical question that has been propounded. In view of my earlier limitation of my own testimony here, a question of such importance should

(Testimony of George B. Allison.)

certainly be answered by our consulting electrical engineer, rather than myself.

Q. (By Mr. McPharlin): That would be your response then to the following question, which is almost identical?

A. No, not the following question.

Q. The following question is this, and I will read this to you, Mr. Allison: "Considering the Electrical Specifications, Plans, Contract Documents and other Exhibits furnished you, in your opinion is the Subcontractor required to furnish and install a low voltage signalling system consisting of push buttons and mechanical door chimes?"

A. The paragraph inserted in the testimony, 15-20, clearly calls for this with one qualifying clause in that paragraph; "where indicated on the drawing" is the qualifying clause.

In our interpretation, on a normal project we would require the contractor to include a signalling system because of the great detail which has been given the description of the signalling system in the Specifications. Technically, in our opinion, the contractor would have an argument because there is a question of designation on the drawings.

But the clear intent is that there shall be a "Signalling System (For Quarters)," as captioned under 15-20.

Mr. McPharlin: Those are all of my interrogatories, your Honor.

The Court: Is there any cross examination?

(Testimony of George B. Allison.)

Mr. Benedict: Just a few questions, if the Court please.

Cross Examination

Q. (By Mr. Benedict): Mr. Allison, referring to Sheet 5 of the Plans before you, I believe you have testified that they indicate fluorescent fixtures.

A. It is four 36-inch fluorescent tubes.

Q. Does that indicate the fixtures or simply the type of outlet?

A. I think a great deal of this discussion has to do with the word "fixture." I would say that clearly four 36-inch fluorescent tubes are required under the contract. The housing for those tubes and the manner of attaching them to the outlet is a matter for an electrical engineer to answer.

Q. In other words, the designation there merely calls for the number of fluorescent tubes that are to be inserted in a particular fluorescent fixture, which is not designated, isn't that true?

A. The drawings show a housing for those tubes; some bracket to hold up the tubes shown here in the drawing.

Q. It shows some kind of a housing?

A. That is right.

Q. It doesn't show any designation as to what particular type housing is to be used?

A. I fail to find any specific reference to that in the document.

Q. Isn't it true that there are many different

(Testimony of George B. Allison.)

types of housing that could be used for a tube, a fluorescent fixture?

A. The word "many" might be qualified, or several.

Q. By the term "housing," is that synonymous with "fixture" or not?

A. That question should be answered by an electrical engineer.

Q. I was wondering in what sense you used it when you referred to the term "housing."

A. My reference had to do with Section A on Sheet 5, which shows some support for the end of the fluorescent tubes here. Here is a fluorescent tube.

The Court: Will you read that portion to which you refer?

The Witness: Your Honor, on Section A of Sheet 5, a three-quarter-inch plywood shelf, I take it, is shown in the hall closet, and a designation of four 36-inch fluorescent tubes are shown on that section, together with some sort of supporting unit, indicating that the fluorescent tubes are held up.

Q. (By Mr. Benedict): Mr. Allison, were you also supplied a small electrical drawing to examine, in addition to what you have here before you, Exhibit Radkovich's H? Were you also given a smaller drawing?

Mr. Benedict: Mr. Clerk, may I have Woolley's Exhibit 5?

The Clerk: I think the witness has it.

The Witness: It is right here.

(Testimony of George B. Allison.)

Mr. Benedict: All right. Yes, I see. I had forgotten. I thought it was a smaller drawing, but it is not. That is the one I meant.

The Witness: That is the same as this first sheet here (indicating).

Q. (By Mr. Benedict): That shows the same detail that you have just testified to, in reference to fluorescent tubes? A. That is on Sheet 5.

Q. But Sheet 6, it does not show that in reference to the fluorescent tubes?

A. Sheet 6 indicates in the subject piece of casework 2(f), fluorescent, and that is the only designation. They are shown, however, clearly connected on a switch and located as A and B in the casework.

Q. Well now, would those designations refer to the type of outlet or not that was to be used?

A. I think the electrical engineer should answer that question.

Q. To the best of your knowledge, that would not indicate any particular fluorescent fixture, would it? A. No, nothing specific.

Mr. Benedict: If the Court please, that concludes my cross examination. I would like to then propound the questions heretofore submitted to the Court on the part of E. B. Woolley.

The Court: Is there anything further so far as the cross examination is concerned?

Mr. McPharlin: No further redirect examination on that, your Honor.

(Testimony of George B. Allison.)

The Court: All right. You may proceed with your questions.

Mr. Benedict: Question No. 1. "What is meant by the term 'Type numbers' in reference to electrical fixtures when used in building plans and specifications?"

The Witness: Your Honor, my answer would be qualified for any court record. I think the answer should come from a consulting electrical engineer, who would prepare such information for our own use.

Mr. Benedict: 2, "Are there any type numbers for electrical fixtures indicated on Woolley's Exhibit 5?"

The Witness: No.

Mr. Benedict: 3, "Are there any symbols on Woolley's Exhibit 5 which refer to the types of outlets that are to be installed?"

The Witness: At this point, your Honor, I would like to ask whether the federal specification referred to in the specifications has reference to outlets, Federal Specification W-O-821-A, under 15-07. And likewise Federal Specification W-O-806 under the same paragraph, whether they have been reviewed in connection with this testimony.

The Court: What page is that?

The Witness: On page 15-4.

The Court: Exhibit number?

The Witness: They would be under Exhibit B. I am not familiar with those Federal Specifications and I doubt if the ordinary electrical engineer

(Testimony of George B. Allison.)

would be, unless he had a copy before him. They are highly specified and since they are included under the Specifications, I should think they might be pertinent to the question.

Mr. Benedict: Well, Mr. Allison, in reference to the question that I just asked, are you able to answer that? "Are there any symbols on Woolley's Exhibit 5 which refer to the types of outlets that are to be installed?"

The Witness: I think the electrical engineer should answer that question.

Mr. Benedict: Well, in view of your answer to Question No. 3, Question No. 4 is inapplicable, so there would be no point in asking it of you.

5, "If your answer to Question 3,——" the same statement would apply to Question No. 5.

The Witness: Yes.

Mr. Benedict: That is all, your Honor.

The Court: Cross examination?

Mr. McPharlin: That is all, your Honor.

The Court: Is there anything further from any of the other parties?

Mr. McCall: Nothing further.

Mr. Benedict: No, your Honor. That is all.

The Court: I suppose you have testified to everything you had in mind, Mr. Allison, in reference—

The Witness: I could make some more general observations which might or might not be appropriate. This is my first appearance as an expert witness.

(Testimony of George B. Allison.)

The Court: If these are your expert opinions, we will be glad to have them for the record, in relation to these questions. That is to say, you want to explain some of your answers or you want to add something to them?

The Witness: I believe that the specific answers to the questions that were advanced by counsel have indicated, from my replies, that they would be most authentically applicable if they were given by a good consulting electrical engineer. In the building trade of today there are so many complex specialties phases of it, which are of a highly specialized nature, it is customary to employ experts in the field.

Our office, together with many offices, retain, on a consulting basis, men who are recognized as specialists in their particular fields.

As to the Army Housing Project first mentioned, I have that set of prints with me, although they aren't a part of this exhibit. That might or might not have any bearing on this case.

The Court: The question I would like to ask you is this: Are you familiar with the subject, that there is a difference in the range in price in fluorescent fixtures, which could be attached to outlets shown to be wired on the plans?

The Witness: Yes. My familiarity with fluorescent fixtures, as with many features of the electrical business, is that there is a very great range in cost and price.

The Court: Also with respect to wall bracket

(Testimony of George B. Allison.)

fixtures, which could be placed on outlets shown, is there a variation there, too?

The Witness: Yes, there would be a tremendous variation. Technically, a wall bracket might be a very simple bedroom wall lamp or it might be a very elaborate type of—my own testimony rather hedged. The word “fixture,” I think you will find the word “fixture” was a little vague in these documents.

The Court: You could say the same for all other lights for which outlets have been provided in the plans?

The Witness: I think so. Under the specifications—let me read Paragraph 15-19, headed “Fixtures. Where type numbers are indicated on the drawings, the contractor shall furnish and install all lighting fixtures in accordance with the applicable details.”

Elsewhere in the documents—I don't recall the exact paragraph—some reference appeared as to a list of fixtures. But I was unable to find such a list.

The Court: Is there anything further, Mr. McPharlin?

Mr. McPharlin: Yes.

Do you recall reading the paragraph that provides that the contractor will submit a list of materials, fixtures and so forth that he intends to use?

The Court: Would that be a matter for this witness to discuss?

Mr. McPharlin: Yes, I believe it would be, your

(Testimony of George B. Allison.)

Honor. He has just been referring to the term "fixtures" as used in those Specifications, and I wanted to call his attention or question him on this other paragraph.

The Witness: May I read that Paragraph 15-03, Sub b, "Materials and Equipment Schedules"?

Mr. McPharlin: Yes, you may read it.

The Court: Yes.

The Witness: "As soon as practicable and within 30 days after the date of award of a contract and before any materials, fixtures, or equipment are purchased, the Contractor shall submit to the Contracting Officer for approval a complete list, in triplicate, of materials, fixtures, and equipment to be incorporated in the work. The list shall include catalog numbers, cuts, diagrams, drawings and such other descriptive data as may be required by the Contracting Officer. No consideration will be given to partial lists submitted from time to time. Approval of materials will be based on manufacturers published ratings. Any materials, fixtures and equipment listed which are not in accordance with the Specification requirements may be rejected."

Mr. McPharlin: Isn't it sometimes customary for an electrical subcontractor to submit lists of materials, including fixtures, which he intends to use, for approval by the owner?

Mr. Benedict: I object to that, if the Court please, as calling for a conclusion, and furthermore, the question, if it is an attempt to prove custom, it is improperly worded, because it states, "Is it

(Testimony of George B. Allison.)

sometimes customary." I don't think you can prove custom by what happens occasionally.

The Court: If he knows there is some custom, he may state generally, if he knows that such a custom exists in that trade.

Or is that within the category of the electrical engineer?

The Witness: Very definitely, I would say, that is a matter for the electrical engineer to reply to.

Mr. McPharlin: You are familiar with the general customs in the building trade, aren't you, Mr. Allison? I don't mean any particular technical item, but generally speaking you are familiar with the customs in the building trade, as to plans and specifications?

The Witness: Insofar as our own practice is concerned, yes.

Mr. McPharlin: Now, ordinarily, when a general contractor is bidding on a contract, a large project, which contains a set of specifications and drawings, and those specifications are divided into sections for different specialized trades, isn't it true that a general contractor just turns that over to the subcontractors in that trade, from whom he is calling for bids, and that a general contractor himself does not attempt to interpret plans and specifications, for example, under the electrical section?

Mr. Benedict: If the Court please, I object to that question as an improper question so far as **this witness** is concerned. I think we are again going to the very question for your Honor to de-

(Testimony of George B. Allison.)

cide. Custom could never prevail over the terminology of an agreement; may or may not be the contract, so far as that is concerned.

The Court: I think that question is objectionable.

Mr. McPharlin: Mr. Allison, have you noticed in the conditions of the prime contract references to what should be done in case of any ambiguity between the plans and specifications?

The Court: There is a provision in the contract. We are all familiar with that, are we not? It is in the Specifications. That is not a matter of an expert opinion. Or am I correct?

Mr. McPharlin: I wanted to follow that up with another question, your Honor. That is why I was calling his attention to it.

The Witness: The general contract, in answer to your question, under Article 15, treats with disputes, and is headed "Disputes."

Mr. McPharlin: Article 2 of the general conditions provides that, "Anything mentioned in the specifications and not shown on drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern."

Does that apply to our situation here, Mr. Allison?

Mr. Benedict: The Court please, that is the very question for the Court to determine.

(Testimony of George B. Allison.)

The Court: The objection is sustained.

Mr. McPharlin: In case of any ambiguity, under one of the technical sections of the Specifications, applying to a particular trade, whose duty would it be to bring that to the attention of the owner, the subcontractor engaged in that trade or the general contractor?

Mr. Benedict: I object to that as calling for a conclusion of the witness. It is all set forth in the agreement there.

The Court: That is all covered by the terms of the contract.

Mr. McPharlin: No further questions.

The Court: Just one more question, Mr. Allison.

In drawing plans you treat the item for electric wiring in a different category from the fixtures?

The Witness: Oh, yes.

The Court: In other words, they are separate items?

The Witness: Yes.

The Court: One has to do with wiring and the other has to do with fixtures?

The Witness: The fixtures, in our practice—in our practice the fixtures are covered in several different ways, but they are always specifically set aside, as contrasted to the outlets, the symbols.

The Court: Yes.

The Witness: We sometimes require an allowance for fixtures, when the cost situation is rather vague at the time the bids are taken. Sometimes fixtures are actually listed in the schedule, that is,

(Testimony of George B. Allison.)

listed in the schedule by actual number and so forth. At other times there is a list of the general sort of fixtures we have in mind, with a provision that the selection of fixtures shall be subject to the approval of the architect.

The Court: Is there anything further?

Mr. McPharlin: No further questions.

Mr. Benedict: No further questions.

The Court: Thank you, Mr. Allison, for your assistance.

The Witness: I was very sorry I couldn't answer all the questions, but in fairness to all concerned, why, my usefulness is rather limited in a rather specialized situation of this kind.

The Court: Yes.

(Witness excused.)

[Endorsed]: Filed Oct. 29, 1952.

[Endorsed]: No. 13606. United States Court of Appeals for the Ninth Circuit. Glens Falls Indemnity Company, a corporation, Appellant, vs. United States of America, at the Relation of and to the Use of Westinghouse Electric Supply Company, Wm. Radkovich Company, Inc., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 3, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13606

GLENS FALLS INDEMNITY COMPANY,
a Corporation,

Appellant,

vs.

WM. RADKOVICH COMPANY, INC.,
a Corporation, et al.,

Appellees.

POINTS ON WHICH APPELLANT INTENDS
TO RELY ON APPEAL

Pursuant to the Rules of the United States Court of Appeals for the Ninth Circuit, Rule 19, appellant

herein makes a concise statement of the points on which it intends to rely and designates the record which is material to the consideration of the appeal.

The appellant is Glens Falls Indemnity Company, usually hereinafter referred to as appellant. Appellant was a cross-defendant in a cross-claim filed by Wm. Radkovich Company, Inc. and its sureties, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation. The said appellee sureties are hereinafter referred to as sureties for Wm. Radkovich Company, Inc. and collectively said appellees above named are referred to as cross-claimants. Wm. Radkovich Company, Inc. is hereinafter referred to by name or when more convenient as obligee of the surety bonds involved in the action. E. B. Woolley was the other cross-defendant with appellant on the cross-claim filed by Wm. Radkovich Company, Inc. and is sometimes hereinafter referred to as principal on the said surety bonds.

Points on Which Appellant Intends to Rely

1. The cross-claim of cross-complainants fails to state a claim against appellant upon which relief can be granted in the following particulars:

(A) Said cross-claimants failed to make any allegations showing liability of appellant and further failed to allege either compliance by Wm. Radkovich Company, Inc., or an excuse for non-compliance,

with the express conditions precedent to liability of appellant on said Performance Bond.

(B) Said cross-claimants failed to make any allegations showing liability of appellant and particularly failed to allege that the obligee (Wm. Radkovich Company, Inc.) named in the Payment Bond suffered loss or damage while the said bond only obligated the appellant to "indemnify and hold obligee free and harmless from and against all loss and damage."

2. The Judgment against appellant cannot be predicated upon appellant's Performance Bond for the following reasons:

(A) The trial court found in Findings XIII and XVI that E. B. Woolley, the principal on said bond, fully completed the work specified in the subcontract in question between Wm. Radkovich Company, Inc. and E. B. Woolley upon completion of which the obligation of appellant under the Performance Bond was to cease. Therefore, these Findings do not support Conclusion of Law II or the Judgment against appellant insofar as said Conclusion of Law and Judgment are based upon the Performance Bond.

(B) Evidence was introduced upon the material issue of fact raised by appellant at the trial that the obligee, Wm. Radkovich Company, Inc., failed to comply with the express conditions precedent contained in said Performance Bond and the court erred in failing to make findings upon the material issues of fact raised by the said express conditions precedent which are express conditions precedent to liability of appellant. Conclusion of Law II and

Judgment against appellant are therefore not supported by the Findings.

(a) Evidence was introduced on the issue of compliance by the obligee with the express condition precedent in said bond which reads, "The said Surety shall be notified in writing of any act on the part of said Principal, or its agents or employees, which may involve a loss for which the said Surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Oblige, * * *" The trial court failed to make any finding upon the material issue of fact of whether said condition precedent was complied with in two particulars: First, as to whether any notice was given to appellant when Wm. Radkovich Company, Inc. was advised by the principal, E. B. Woolley, that he was in financial difficulty and, Second, as to whether the giving of notice to appellant some sixty-one days after receiving the claim of Westinghouse Electric Supply Company for the payment of \$43,514.05 for materials supplied to, but not paid for by E. B. Woolley is in compliance with said express condition precedent. In this respect the Findings are lacking on a material issue of fact necessary to support Conclusion of Law II and the Judgment against appellant.

(b) Evidence was introduced in many particulars relative to the performance and failure of performance of the subcontract by Wm. Radkovich Company, Inc. The trial court failed to make any finding as to whether Wm. Radkovich Company, Inc. well and truly performed and fulfilled all of the un-

dertakings, covenants, terms, conditions and agreements of the said subcontract. An affirmative finding of such performance is necessary to sustain Conclusion of Law II and the Judgment against appellant because such performance is an express condition precedent to recovery against appellant upon the Performance Bond.

(C) Said cross-claimants failed to prove a material and substantial element of their claim in that they failed to show that E. B. Woolley had been paid according to the terms of the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley, thus failing to establish performance of express conditions precedent contained in said Performance Bond.

(It affirmatively appears from Finding XVIII that cross-claimants entirely failed to prove compliance with the first express condition precedent to the right to recover against appellant on the Performance Bond which condition is, "The Obligee shall keep, do and perform each and every of the matters and things set forth and specified in said subcontract, to be by the Obligee kept, done or performed at the times and in the manner as in said contract specified." In Finding XVIII, the court found, "That there is no evidence from which the court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which

the court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month." The burden of showing compliance with the subcontract, including payment in accordance with its terms, as an express condition precedent to recovery was on cross-claimants. Conclusion of Law II and the Judgment against appellant are therefore unsupported by the Findings and impeached by Finding XVIII.)

(D) Appellant was exonerated from liability upon said Performance Bond because after the execution of said bond, the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley was materially altered by the parties thereto without the knowledge or consent of appellant in the following respects:

(Appellant asserts that the trial court committed reversible error for failing to make a finding on the material issue of fact as to whether the subcontract was materially altered after the execution of the bond in question without the knowledge or consent of the surety and further that the Findings made which relate to this issue are in direct and irreconcilable conflict and that in this respect the Conclusions of Law and Judgment are unsupported by the Findings.)

(a) Wm. Radkovich Company, Inc. required E. B. Woolley to perform certain work and to furnish certain materials not within the scope of the subcontract or any authorized modification thereof.

(Finding XV is unsupported by the evidence in that there is no evidence indicating that any ma-

terials were furnished by E. B. Woolley other than those purchased from Westinghouse Electric Supply Company. The court has found that all of the materials furnished by Westinghouse Electric Supply Company were used by Woolley in the performance of and in the work required by, the subcontract—Findings XI, XII. The only other materials were furnished by Wm. Radkovich Company, Inc. and were used in the performance of the subcontract—Finding XIV.

Finding XV is further unsupported by the evidence in that there is no evidence to indicate that there were any “additions to the structures and improvements covered by said contracts.”

The only rationale of the Findings is that the subcontract was altered by the addition of \$8,277.67 worth of extra work and materials. Otherwise, Findings XI, XII, XIV and XV are in irreconcilable conflict. In either event they do not support Conclusion of Law II or the Judgment against appellant. As a matter of law, such a material alteration of the contract after the bond was written exonerates the surety. Any interpretation of the Findings which connotes a separate agreement as to “extras” likewise impeaches Conclusion of Law II and the Judgment in that appellant’s bond runs only to the subcontract, and no other, and appellant cannot be held responsible for materials not used in the subcontract. The Findings are not adequate to make segregation of materials between the subcontract and what is referred to as extras and hence there is no alternative to reversal.)

(b) Wm. Radkovich Company, Inc. paid certain sums of money to E. B. Woolley before such sums of money were earned by or payable to E. B. Woolley pursuant to the terms of the said subcontract which provided a schedule of progress payments.

(Findings XVII and XVIII are inadequate to sustain Conclusion of Law II and the Judgment. The trial court has failed to make a finding on the material issue of fact as to whether E. B. Woolley was paid money before such money was earned. Evidence was introduced from which the fact is apparent. It is reversible error not to make a finding on this issue.)

(c) Wm. Radkovich Company, Inc. and E. B. Woolley changed the method of payment under the said subcontract from the progress payment method of payment therein provided for to a unit method of payment.

(Finding XVIII is inadequate to resolve the material issue of fact above stated upon which evidence was introduced. The trial court failed to find upon this issue and Conclusion of Law II and the Judgment are therefore, not supported by the Findings of Fact. Appellant further contends that Finding XVIII is unsupported by the evidence insofar as said finding is to the effect that there was no departure from the terms of the subcontract with reference to the method of payments to E. B. Woolley.)

(E) That portion of Finding XVIII which reads, "That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon

as defenses" is unsupported by the evidence in the following particulars more specifically detailed above:

(a) The cross-claim fails to state a claim against appellant upon which relief can be granted.

(b) The subcontract was materially altered by the parties thereto after the said bond was executed and without the knowledge or consent of appellant.

(c) Payments were made by Wm. Radkovich Company, Inc. to E. B. Woolley before said sums were earned by E. B. Woolley.

(d) Wm. Radkovich Company, Inc. required E. B. Woolley to furnish extra and additional materials and to perform extra and additional work not called for by the subcontract.

3. The Judgment against appellant cannot be predicated upon appellant's Payment Bond for the following reasons:

(A) Wm. Radkovich Company, Inc., the obligee under said Payment Bond has not suffered such loss or damage as appellant is bound to indemnify said obligee against.

(The Payment Bond being a bond of indemnity only, Wm. Radkovich Company, Inc., the obligee named in the Payment Bond, is not entitled to recover against appellant unless he has paid the claim of Westinghouse Electric Supply Company. There is neither allegation nor evidence of such payment and there is no finding upon this issue which is a material issue of fact. Therefore, Conclusion of Law II and the Judgment are unsupported by the Findings.)

(B) Appellant was exonerated from liability upon said Payment Bond because after execution of said bond the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley was materially altered by the parties thereto without the consent of appellant in the following respects:

(Appellant asserts that the trial court committed reversible error for failing to make a finding on the material issue of fact as to whether the subcontract was materially altered after the execution of the bond in question without the knowledge or consent of the surety and further that the Findings made which relate to this issue are in direct and irreconcilable conflict and that in this respect the Conclusions of Law and Judgment are unsupported by the Findings.)

(a) Wm. Radkovich Company, Inc. required E. B. Woolley to perform certain work and to furnish certain materials not within the scope of the subcontract or any authorized modification thereof.

(Finding XV is unsupported by the evidence in that there is no evidence indicating that any materials were furnished by E. B. Woolley other than those purchased from Westinghouse Electric Supply Company. The court has found that all of the materials furnished by Westinghouse Electric Supply Company were used by Woolley in the performance of and in the work required by, the subcontract—Findings XI, XII. The only other materials were furnished by Wm. Radkovich Company, Inc. and were used in the performance of the subcontract—Finding XIV.

Finding XV is further unsupported by the evidence in that there is no evidence to indicate there were any "additions to the structures and improvements covered by said contracts."

The only rationale of the Findings is that the subcontract was altered by the addition of \$8,277.67 worth of extra work and materials. Otherwise, Findings XI, XII, XIV and XV are in irreconcilable conflict. In either event, they do not support Conclusion of Law II or the Judgment against appellant. As a matter of law, such a material alteration of the contract after the bond was written exonerates the surety. Any interpretation of the Findings which connotes a separate agreement as to "extras" likewise impeaches Conclusion of Law II and the Judgment in that appellant's bond runs only to the subcontract, and no other, and appellant cannot be held responsible for materials not used in the subcontract. The Findings are not adequate to make segregation of materials between the subcontract and what is referred to as extras and hence there is no alternative to reversal.)

(b) Wm. Radkovich Company, Inc. paid certain sums of money to E. B. Woolley before such sums of money were earned by or payable to E. B. Woolley pursuant to the terms of the said subcontract which provided a schedule of progress payments.

(Findings XVII and XVIII are inadequate to sustain Conclusion of Law II and the Judgment. The trial court has failed to make a finding on the material issue of fact as to whether E. B. Woolley was paid money before such money was earned.

Evidence was introduced from which the fact is apparent. It is reversible error not to make a finding on this issue.)

(c) Wm. Radkovich Company, Inc. and E. B. Woolley changed the method of payment under the said subcontract from the progress payment method of payment therein provided for to a unit method of payment.

(Finding XVIII is inadequate to resolve the material issue of fact above stated upon which evidence was introduced. The trial court failed to find upon this issue and Conclusion of Law II and the Judgment are, therefore not supported by the Findings of Fact. Appellant further contends that Finding XVIII is unsupported by the evidence insofar as said finding is to the effect that there was no departure from the terms of the subcontract with reference to the method of payments to E. B. Woolley.)

4. The Performance Bond and the Payment Bond should be construed together and the conditions precedent to recovery on the Performance Bond should apply equally to the Payment Bond and all of the points relating to conditions precedent which appellant has specified relative to the Performance Bond apply equally to the Payment Bond.

* * * * *

The parties to this appeal will forthwith submit a stipulation subject to order of court that exhibits

need not be printed but that they may be considered by the court in their original form.

Respectfully submitted,

JOHN E. McCALL,
J. HAROLD DECKER,
GEORGE B. T. STURR and
ALBERT LEE STEPHENS, JR.,
/s/ By ALBERT LEE STEPHENS, Jr.,
Attorneys for Glens Falls Indemnity
Company

[Endorsed]: Filed Nov. 10, 1952. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE PRINTING OF EXHIBITS

Whereas, counsel for the respective parties are of the opinion that reference to exhibits will not be frequently required; and

Whereas, there are numerous detailed exhibits, the printing of which would be an expense out of proportion to the usefulness of such printed documents;

Now, Therefore, it is hereby stipulated by the respective parties to this appeal by and through their respective counsel that subject to order of court the exhibits which are part of the record on

appeal need not be printed and that they may be considered by the court in their original form whenever necessary.

Dated: November 10, 1952.

JOHN E. McCALL,
J. HAROLD DECKER,
GEORGE B. T. STURR and
ALBERT LEE STEPHENS, JR.,

/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Appellant

ANDERSON, McPHARLIN &
CONNERS,

/s/ By KENNETH E. LEWIS,
Attorneys for Appellees

/s/ FRANK M. BENEDICT,
Attorney for E. B. Woolley

/s/ GLEN BEHYMER,

/s/ By RALPH W. HOFFMAN,
Attorney for Westinghouse Electric
Supply Company

So Ordered.

/s/ WILLIAM DENMAN,
Chief Judge,

/s/ WM. HEALY,

/s/ WALTER L. POPE,
United States Circuit Judges

[Endorsed]: Filed Nov. 13, 1952. Paul P. O'Brien,
Clerk.

